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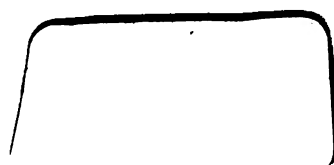
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6
41

OHIO CIRCUIT COURT REPORTS.

NEW SERIES. VOLUME IV.

CASES ADJUDGED

IN

THE CIRCUIT COURTS OF OHIO.

VINTON R. SHEPARD, EDITOR.

CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1904.

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114

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Rec. Dec. 12, 1905

JUDGES OF THE CIRCUIT COURTS OF OHIO

FROM FEBRUARY 8, 1903, TO FEBRUARY 8, 1904.

HON. JOHN C. HALE, *Chief Justice*, Cleveland, Ohio.
HON. ULYSSES L. MARVIN, *Secretary*, Akron, Ohio.

FIRST CIRCUIT.

Counties—Butler, Clermont, Clinton, Hamilton and Warren.

WILLIAM S. GIFFEN.....Hamilton
FERDINAND JELKE, JR.....Cincinnati.
PETER F. SWING.....Cincinnati

SECOND CIRCUIT.

*Counties—Champaign, Clark, Darke, Fayette, Franklin, Greene,
Madison, Miami, Montgomery, Preble and Shelby.*

THEODORE SULLIVANTroy.
HARRISON WILSONSidney.
CHARLES W. DUSTIN.....Dayton.

THIRD CIRCUIT.

*Counties—Allen, Auglaize, Crawford, Defiance, Hancock, Hardin,
Henry, Logan, Marion, Mercer, Paulding, Putnam, Seneca,
Union, Van Wert and Wyandot.*

JAMES H. DAY.....Celina.
WILLIAM T. MOONEY.....St. Mary's.
CALEB H. NORRIS.....Marion.

FOURTH CIRCUIT.

*Counties—Adams, Athens, Brown, Gallia, Highland, Hocking, Jackson,
Lawrence, Meigs, Pickaway, Pike, Ross, Scioto,
Vinton and Washington.*

THOMAS CHERRINGTONIronton.
THOMAS A. JONES.....Jackson.
FESTUS WALTERSCircleville.

FIFTH CIRCUIT.

*Counties—Ashland, Coshocton, Delaware, Fairfield, Holmes, Knox,
Licking, Morgan, Morrow, Muskingum, Perry, Richland,
Stark, Tuscarawas and Wayne.*

RICHARD M. VOORHEES.....Coshocton.
MAURICE H. DONAHUE.....New Lexington.
THOMAS T. McCARTY.....Canton.

SIXTH CIRCUIT.

*Counties—Erie, Fulton, Huron, Lucas, Ottawa, Sandusky,
Williams and Wood.*

ROBERT S. PARKER.....Bowling Green.
LENN W. HULL.....Sandusky.
GEORGE R. HAYNES.....Toledo.

SEVENTH CIRCUIT.

*Counties—Ashtabula, Belmont, Carroll, Columbiana, Geauga, Guernsey,
Harrison, Jefferson, Lake, Mahoning, Monroe,
Noble, Portage and Trumbull.*

PETER A. LAUBIE.....Salem.
JOHN M. COOK.....Steubenville.
JEROME B. BURROWS.....Painesville.

EIGHTH CIRCUIT.

Counties—Cuyahoga, Lorain, Medina and Summit.

JOHN C. HALE.....Cleveland.
ULYSSES L. MARVIN.....Akron.
LOUIS H. WINCH.....Cleveland.

TABLE OF CASES.

Akron v. France.....	496	Cleveland, Payne v.....	37
Akron v. C. T. & V. R. R. Co..	632	C. M. & L. Traction Co., Mil-	
Alta Portland Cement Co.,		ford v.....	191
Contractors & Builders		Coghlin v. Coghlin	161
Supply Co., v.	225	Cole, Schnitzer v.....	319
American Roll Wrapper		Contractors & Builders Sup-	
Paper Co., Toledo Paper		ply Co. v. Alta Portland	
Box Co. v.....	17	Cement Co	225
Batdorf, Kefauver v.	427	Coon, State, ex rel, v.....	560
Becker, Rapp v.....	139	Coss v. Mansfield Lodge B.	
Bennington, Campbell v....	447	P. O. E.....	11
Benham v. Cincinnati.....	36	Cowan, receiver, Whistler v..	625
Block, Tidd, admr., v.....	216	Crockett v. Red Cross.....	519
Board of Elections, State, ex		C. S. & H. Ry., Monnett v....	369
rel, v	398	C. T. & V. R. R. Co., Akron v.	632
Bode v. Werner.....	158	Dayton & Union Ry. v. Day-	
Bowers v. Detroit Southern		ton & Muncie Traction Co. 329	
Ry	479	Desnoyers, Brooklyn B. &	
Bowers, treasurer, State, ex		L. A. Co. v.....	337
rel, v	345	Detroit Southern Ry., Bow-	
Bretz v. Moore.....	556	ers v.	479
Brooklyn B. & L. A. Co. v.		DeWitt, Turner v.....	434
Desnoyers	337	D. & M. Traction Co., Dayton	
Brown-Ketcham Iron Works		& Union Ry. v.....	329
v. Hazen	582	Diamond Rubber Co. v.	
Brown v. Parham.....	344	McClurg	641
Brown, Scottish Insurance		Dorger v. Woodward.....	623
Co. v.....	78	Draper, Jones v.....	105
Burke v. Wapakoneta.....	482	Dwight, Meyers v.....	431
Burski, C. C. B. Ry. Co. v....	98	Erie Railroad, Cleveland	
Burton Telephone Co. v.		Burial Case Co. v.....	365
Gordon	1	Flke v. State.....	81
Caldwell v. Peaslee	654	Fisher, L. S. & M. S. Ry. v..	593
Campbell v. Bennington....	447	Fisher, W. & L. E. Ry. v....	120
Cave, State, ex rel, v.....	647	France, Akron v.....	496
C. C. C. & St. L. Ry. v. State.	126	Gamble, Methodist Episcopal	
C. C. C. & St. L. Ry. v. Tehan	145	Church v.	45
Charbonneau v. Roberts....	574	Gibson, treasurer, State, ex	
Cilley, Harper, trustee, v....	55	rel, v.	433
Cincinnati C. B. R. R. v.		Godfrey, State, ex rel, v....	465
Burski	98	Gordon, Burton Telephone	
Cincinnati, Sharp v.....	19	Co. v.	1
Cincinnati, Thornton v.....	31	Graveson, Lord v.....	268
Claypool v. Claypool, admr..	577	Great China Tea Co., N. & W.	
Cleveland Burial Case Co.		Railway v.	500
v. Erie R. R.....	365	Greeley Bros. v. Zelthaml....	25
Cleveland Electric Ry., Lieb-			
lang v	516		

Greenberg v. Murphy.....	531	Methodist Episcopal Church	
Gullder v. State.....	73	v. Gamble.....	45
Hammel v. Ins. Co. of Pa....	380	Metropolitan Life Ins. Co. v.	
Hanlon, Shaller v.....	401	Walton	133
Hance, State v.....	541	Meyers v. Dwight.....	431
Harper, trustee, v. Cilley....	55	Meyers, Mahler-Wolf Pro-	
Harpham v. Northern Trac-		duce Co. v.....	264
tion Co.	257	McClerg, Diamond Rubber	
Hattersly v. Waterville		Co. v.....	641
(Village).	242	McClure v. Lorain County..	445
Hayes v. Yost, treasurer....	455	Miller, Pope v.....	564
Hazen, Brown-Ketcham Iron		Milford v. C. M. & L. Traction	
Works v.	582	Co.	191
Holles v. Riddle, admr.....	449	Milligan v. Plymouth State	
Hotchkiss, L. S. & M. S. Ry. v.	505	Bank	585
Humphrey Pop Corn Co.,		Modern Woodmen, Snow v..	68
Johnson v.....	49	Monnett v. C. S. & H. R. R.	
Insurance Co. of Pa., Ham-		Co.	369
mel v.....	380	Moore, Bretz v.....	556
In re Oscar Julius.....	604	Murphy, Greenberg v.	531
Jackson, North Amherst		Mutual Life Ins. Co., Plaut v.	94
Home Telephone Co. v....	386	Nauman v. Nauman	298
Jeffrey, mayor, v. State....	494	Naylor, admr. v. P. C. C. &	
Johnson v. Humphrey Pop		St. L. Ry. Co.....	437
Corn Co.	49	North Amherst Home Tele-	
Johnson v. Woodling.....	160	phone Co. v. Jackson....	386
Jones v. Draper.....	105	Northern Traction Co.,	
Julius, In re	604	Harpham v.....	257
Kappes v. State.....	14	N. Y. C. & St. L. Ry. v. Roe,	
Kefauver v. Batdorf.....	427	adm.	284
Kloeb, auditor, v. Mercer		N. & W. Ry. Co. v. Great	
County	565	China Tea Co.....	500
Knapp v. State.....	184	Orlopp v. Schueller, admr....	611
Koppenberger, Weet, execr.,		Osmann v. Schmitz.....	602
v.	305	Owsley v. Price.....	273
Lieblang v. Cleveland Elec-		Parham, Brown v.....	344
tric Ry.	516	Payne v. Cleveland.....	37
Lindsay v. State.....	409	P. C. C. & St. L. Ry., Naylor,	
Lorain County, McClure v..	445	adm.	437
Lord v. Graveson.....	268	Peaslee, Caldwell v.....	654
L. S. & M. S. Ry. v. Fisher..	593	Plaut, admr. v. Mutual Life	
L. S. & M. S. Ry. v. Hotchkiss	505	Ins. Co.....	94
Mahler-Wolf Produce Co. v.		Plymouth State Bank, Mil-	
Meyers	264	ligan v.....	585
Manley v. W. & L. E. Ry. Co.	384	Pope v. Miller.....	564
Mansfield Lodge B. P. O. E.,		Price, Owsley v.....	273
Coss v.....	11	Price v. Toledo.....	57
Massillon Stoneware Co.,		Rapp v. Becker.....	139
Strauck v.....	536	Red Cross, Crockett v.....	519
Mercer County, Kloeb, aud-		Rewell v. Warden	545
itor, v.....	565	Riddle, admr., Holles v....	449
Merchants & Clerks' Savings		Roberts, Charbonneau v....	574
Bank, Security Trust Co. v.	616	Roe, admr., N. Y. C. & St. L.	
		Ry. v.....	284
		Root, Security Trust Co. v..	129

TABLE OF CASES.

VII

Schell v. Youngstown I. & S. Co.....	172	State, Kappes v.....	14
Schnitzer v. Cole.....	319	State, Knapp v.....	184
Schmitz, Osmann v.	502	State, Lindsay v.....	409
Scottish U. and N. Ins. Co. v. Brown	78	State, Smith v.....	101
Schueller, admr., Orlopp v....	611	State, Williams v.....	193
Security Trust Co. v. Merchants & Clerks' Savings Bank	616	Strauck v. Massillon Stone-ware Co.....	536
Security Trust Co. v. Root..	129	Telschow, Slipman v.....	635
Shailer v. Hanlon.....	401	Tehan, C. C. C. & St. L. Ry. v.	145
Sharp v. Cincinnati.....	19	Thornton v. Cincinnati.....	31
Slipman v. Telschow.....	635	Tidd, admr. v. Block.....	216
Smith v. State.....	101	Toledo Paper Box Co. v. American Roll Wrapper Paper Co.....	17
Smith, Union S. B. & T. Co. v.	237	Toledo, Price v.....	57
Snow v. Modern Woodmen..	68	Turner v. DeWitt.....	434
Solomon v. Solomon.....	221	Union S. B. & T. Co. v. Smith	237
Southern Ohio L. & T. Co., Spies v.....	103	Walton, Metropolitan Life Ins. Co. v.....	133
Spangenberg v. Zumstein...	406	Wapakoneta, Burke v.....	482
Spiegel, Judge, State, ex rel, v.	256	Warden, Rewell v.....	545
Spies v. Southern Ohio L. & T. Co.....	103	Waterville (Village), Hattersly v.....	242
State, C. C. C. & St. L. Ry. v.	126	Werner, Bode v.....	158
State, ex rel, v. Board of Elections	398	West, excr. v. Koppenberger.	305
State, ex rel v. Bowers, treasurer	345	W. & L. E. R. R. v. Fisher...	120
State, ex rel, v. Coon.....	560	Whistler v. Cowan.....	625
State, ex rel, v. Gibson, treasurer	433	W. & L. E. Ry., Manley v....	384
State, ex rel, v. Godfrey....	465	Williams v. State.....	193
State, ex rel Mowry, v. Cave.	647	Wooding, Johnson v.....	160
State, ex rel, v. Spiegel, Judge	255	Woodward, Dorger v.....	623
State, Flke v.....	81	Youngstown I. & S. Co., Schell v.....	172
State, Guilder v.....	73	Yost, treasurer, Hayes v....	455
State v. Hance.....	541		
State, Jeffrey, mayor, v....	494	Zeithaml, Greeley Bros. v...	25
		Zumstein, Spangenberg v....	406

CASES DISPOSED OF IN THE SUPREME COURT.

The following mentioned cases, reported in this volume, have been disposed of in the Supreme Court in the manner indicated:

AFFIRMED.

Johnson v. Humphrey Pop Corn Co.
Scottish Union & National Insurance Co. v. Brown.
Plaut, Administrator, v. Mutual Life Insurance Co.
The C., C., C. & St. L. Ry. Co. v. State of Ohio.
Williams v. State of Ohio.
State, ex rel City of Lancaster, v. Bowers, Treasurer.
Lindsay v. State of Ohio.
Lake Shore & Michigan Southern Ry. Co. v. Hotchkiss.
Bretz et al v. Moore.
Lake Shore & Michigan Southern Ry. Co. v. Fisher.
Whistler v. Cowan et al, Receivers.

REVERSED.

Knapp v. State of Ohio.

DISMISSED.

Rapp et al v. Becker et al.
Spangenberg v. Zumstein.

OHIO CIRCUIT COURT REPORTS.

VOLUME IV—NEW SERIES.

CAUSES ARGUED AND DETERMINED IN THE CIRCUIT
COURTS OF OHIO.

INJURY FROM A BROKEN TELEPHONE WIRE.

[Circuit Court of Geauga County.]

THE BURTON TELEPHONE COMPANY V. NELLIE GORDON.

Decided, February Term, 1904.

Telephone Wire—Breaks and Falls Across Trolley Wires and Onto the Highway—Becomes Heavily Charged and Injures a Traveler—Necessity for Guard Wires.

Where an injury is occasioned to a traveler upon the public highway by reason of coming in contact with a broken telephone wire which was heavily charged with electricity caused by its falling across the trolley wires of an electric railway:

Held: That whether or not it was the duty of the telephone company to have safe-guarded its wire by guard wires or other appliances to prevent it from becoming so dangerously charged, is a mixed question of law and fact, under the circumstances of each particular case, to be submitted to the jury; and where the jury under proper instructions from the court finds the company negligent for such

failure, a judgment upon the verdict will not be reversed except the verdict is clearly against the evidence.

The brief of Wm. R. King, attorney for plaintiff in error in this case, was as follows:

No statute of the state of Ohio requires any special construction at the crossing of telephone and power wires. This crossing was constructed of good material and it nowhere appears in the evidence that the crossing was faulty. What a "guard wire" is or that one was ever erected or known does not appear from this record; nor does it appear that a guard wire or any other device would have been effective. Good construction and material being admitted and that the wire fell on the trolley through no fault in the wire or fastenings, but from lightning stroke during a severe storm, and that the construction was that in ordinary use, no different construction disclosed by the evidence being anywhere in use, negligence on the part of the company was rebutted.

To entitle the plaintiff to recover the duty was on the plaintiff to show by evidence what means should have been used to prevent contact not actually used by the defendant, and that such means would have been effective. In short, what would have been proper construction and in what respect the crossing in question was not properly constructed, this the plaintiff had not shown nor attempted to show, hence there was nothing to go to the jury. In this state of the evidence at the close of the plaintiff's case we think the court erred in submitting to the jury the issue as to whether other means should have been used to prevent contact, which in effect said to them that they had a right to speculate outside and beyond the evidence as to what the defendant should have done and decide from their own instincts and ideas that some device or means would have prevented the wire from falling and coming in contact with the trolley, not disclosed by the evidence. We base this contention on the case in 6 C. C. Rep., 606.

Brief of N. H. Bostwick, attorney for defendant in error:

Defendant in error contends that reasonable care required that the telephone wire should have been insulated and protected by guard wire or other means in such manner that when it

1904.]

Geauga County.

should fall it could not come in contact with the power wire and transmit the dangerous current to the street below. That company's failure to do so was negligence and was the proximate cause of her injury, and the jury so find it to be. 21 A. & E. Enc. of Law, 2d Ed., 470; 31 L. R. A., 506-570-571, 577 and 590; 39 L. R. A., 499; 53 L. R. A., 147-149; 39 L. R. A., 499; 33 L. R. A., 798; A. & E. Enc. of Law, 2d Ed., 487; 106 Mass., 460; 13 N. P., 234; 43 L. R. A., 508.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

Error to Court of Common Pleas of Geauga County.

The action below was to recover damages by reason of personal injuries to defendant in error in coming in contact with a wire of the telephone company lying in the public highway, which was heavily charged with electricity.

There was a trial and a verdict for plaintiff below against the company; a motion for a new trial on the part of the company, which was overruled, and judgment upon the verdict.

There is little dispute about the facts. The telephone company, having obtained legal authority so to do some years before the injury, constructed a one-wire line from the village of Middlefield to the village of Burton in Geauga county, along the public highway. Some time after the line was constructed The Cleveland & Eastern Railway Company constructed an inter-urban electric railway between the same villages over a right of way procured by it, not upon the public highway. At a point about half a mile from Burton the electric railway crossed the public highway, intersecting the telephone line about at right angles. Where the intersection took place the electric railway company put in a pole on the public highway on which it strung four one-half inch copper wires; two feed wires on a cross bar on top of the pole and two trolley wires upon an arm extending out from the pole. The pole was about twenty-one feet high and the arm upon which the trolley wires were strung was about fourteen feet from the ground. By an arrangement between the telephone company and the railway company the telephone wire was also attached to this same pole about four feet above the two trolley wires, by a glass insulator connected with a metal

bracket, and ran across the two trolley wires about four feet above the same to a pole of the telephone company, also on the public highway, about fifteen feet distant. The telephone wire was not insulated, incased or otherwise guarded. During a severe storm on the evening of June 1st, 1901, this pole of the railway company was struck by lightning; it was shivered and the metal bracket with the glass insulator which supported the telephone wire was knocked from the pole and the telephone wire dropped down and across the trolley wires of the railway company and became charged with a large voltage of electricity from the trolley wires. The evidence does not show that the metal bracket was not properly fastened to the pole or that there was any defect in the wire as to strength or size or that it was impaired or deteriorated to any extent. During the same storm a pole of the telephone company at the outskirts of Burton close to the residence of defendant in error, standing in the highway about one-half mile from the pole referred to, was also struck by lightning and the same wire by the intense heat was severed and that end of the wire next to the first pole referred to fell upon the ground close to the pole, and defendant in error but a very short time after the storm, possibly twenty to thirty minutes, in going to the house of a neighbor upon the public highway at a place where she had a right to be, inadvertently became entangled in the wire and was severely burned and injured by the large amount of electricity in the wire communicated from the trolley wires of the railway company. The poles of the telephone and railway companies had previously been frequently struck by lightning and the wires detached, prior to the injury complained of. The wires were placed by the railway company upon its poles as wires are usually placed when electric railway lines and telephone lines intersect each other.

At the conclusion of plaintiff's evidence a motion was made to take the case from the jury and render a judgment for the telephone company. This motion was overruled as was also, as we have said, the motion for a new trial; and plaintiff in error claims that the court erred in both these regards.

It must be conceded that the judgment of the court below can only be sustained upon the theory that it was the legal duty of

1904.]

Geauga County.

the telephone company under the circumstances to have adopted some means that would reasonably prevent its wire from becoming dangerously charged with electricity from the trolley wires of the railway company and that its failure to do so was negligence.

The introduction of electricity as means of commerce is of recent date. That it may be lawfully used is recognized by both the legislative and judicial department of the state. While it is highly useful, at the same time its use is attended by the greatest danger to person and property. Its potentialities for good are great, but its destructive power is equally as great. It is of the most subtle nature, so subtle that its presence can only be determined by contact which, when it is not under control, usually results in death or great bodily injury.

The use of the public highway is primarily for the public convenience for the purposes of travel. The plaintiff below was upon the side of the highway, and she had a right to rely that she was walking in a safe place. She had a perfect right to go on her way justified by the law that her pathway was secure. If these companies had jointly placed something in the public highway with which she might inadvertently come in contact which was filled with peril, the duty devolved upon them and each of them to show that the peril arose through no fault of theirs.

In *Western Union Telegraph Company et al v. State*, for use of Nelson, 33 Atlantic Reporter, 763, Justice Page of the Court of Appeals of Maryland in a case where Nelson was killed by reason of coming in contact with a broken telegraph wire heavily charged with electricity from the wires of an electric railway company, well says:

“The railway company pursued its business by means of cars propelled by electricity partially supplied through feed wires over and along the edge of the pavement. The telegraph company had its poles also along the curb line, and its wires extending along the street were over and along the feed wire which carried a deadly current. The privilege so granted thus to encumber the public highway with appliances so likely to become dangerous to the public safety unless properly employed and controlled, imposed upon them, and each of them, the duty

of so managing their affairs as not to injure persons lawfully on the streets. They owed it to Nelson that his lawful use of the street should be substantially as safe as it was before the telegraph and railway plants had so occupied it. It was their plain duty not only to properly erect their plants but to maintain them in such condition as not to endanger the public."

Manifestly this is the true rule. Highways are not for the benefit of private corporations, although of a public service character, but for the convenience of the public and when they are appropriated for any other purpose than ordinary public travel reasonable care requires that the care proportionate to the danger must be exercised by such corporations to protect the traveler from harm. This legal principle can not be too often emphasized.

In *Denver Consolidated Electric Company v. John H. Simpson*, 31 L. R. A., 566, it is held:

"An instruction that a company maintaining an electric wire carrying a dangerous current over a public street or alley is not an insurer of the safety of passers-by, but in constructing its line and maintaining the same is bound by the utmost degree of care and diligence—that is, to the highest degree of care, skill and diligence so as to make the same safe against accidents so far as such safety can by the use of such care and diligence be secured—is not erroneous, although it is better to instruct the jury that the company is bound to exercise that reasonable care and caution which would be exercised by a reasonably cautious and prudent person under the same circumstances."

Campbell, J., in the opinion says:

"We think the court was unfortunate in attempting to draw any distinctions in the degrees of care or negligence. It would have been safer and the better practice to instruct the jury, which ought hereafter to be observed, even in cases like the one before us, that the defendant was bound to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances.

"In addition to this, the jury should have been instructed that the care increases as the danger does and that where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger. But in effect this

1904.]

Geauga County.

is what the court did. Under the facts of the case, the law required of the defendant, conducting, as it did, a business so dangerous to the public, the highest degree of care which skill and foresight can attain, consistent with the practical conduct of its business under the known methods and the present state of the particular art."

Would not the exercise of reasonable care upon the part of these two companies that jointly occupied this pole for their wires have required that they should have put up guard wires or adopted some other appliance to have prevented the two wires from coming in contact with each other? They necessarily knew that if the telephone wire fell across the trolley wires injury and possibly death very probably would follow. Had not the break taken place the central station at Burton would have been burned out. If connection was made, a patron with his ear at a telephone on the line would have been injured, possibly killed.

The poles of both companies had many times been previously struck by lightning in electric storms, wires detached, and just such an occurrence as this one should have been anticipated; yet nothing whatever was done to prevent the wires from coming in contact.

In order, however, that a party may be liable in negligence, it is not necessary that he should have contemplated or even been able to anticipate the particular consequences which ensued or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission or that consequences of a generally injurious nature might have been expected. 21 A. & E. En. Law, 487.

In case of *United Electric Railway Company et al v. Shelton*, 89 Tenn., 423 (14 S. W. R., 863), the court held:

"The wire of a telephone company had become impaired where it crossed an electric railway wire, and was in such a condition as to arrest the notice of a prudent man engaged in the business of either company. There was no guard wire over the electric wire. The fall of a burning building broke a telephone pole, which caused the telephone wire to break and fall across the railway wire; and, while in this condition, plaintiff's horse came

in contact with the telephone wire, and was killed. *Held*: That both companies were negligent and liable for the value of the horse."

Turney, C. J., in the opinion says:

"Shelton's horse was killed by coming in contact with a wire of the telegraph and telephone company which had fallen across the trolley wire of the electric railway company. The wire of the telephone company had become much impaired. The falling of a wall of a burning building broke a pole of the telephone company, breaking the wires at several points. At the point of the accident the telephone wires crossed the railway track above the trolley. A broken wire fell across the trolley wire, and, while resting on it, the horse came in contact with it and was instantly killed. There was no guard wire over the trolley wire. The case was tried by the circuit judge without the intervention of a jury. The condition of the telephone wire was such as to arrest the attention of a prudent man engaged in the business of either company. The circuit judge found, under the facts, that both companies were guilty of negligence and responsible for the loss, and gave judgment accordingly. The judgment is correct. While it was the primary duty of the telephone company to see that its wires were in a reasonably safe and sound condition, and protected against the contingency of falling, it was also a duty of the electric company to see that its trolley was in like manner protected from such contingency. While it was the duty of the one company not to use unsound and unprotected wires, it was equally the duty of the other not to operate its road under such defective machinery. It might as well insist that it was not responsible for damages resulting from the fall of a hanging rock which it had constantly recognized as threatening to fall, or of a dead tree which it had frequently noticed with decayed and giving roots, and knew would fall in the first wind or rain. The obligation to see that its road was in good repair, and its machinery in safe operating order, is not confined to the immediate and abstract presence of either, but extends to all surroundings that may depreciate the security of either. Both companies knew of the unprotected trolley, and the consequences of a contact of the wires of the one with those of the other. Both knew of the unsoundness likely to produce a fall of the one upon those of the other. Both were bound to guard against such likelihood, and, having failed to do so, are liable. Affirmed."

In *Block v. Milwaukee Street Railway*, in the Supreme Court of Wisconsin, 89 Wisconsin, 371 (61 North Western Reporter,

1904.]

Geauga County.

1101), was a case in which Block was injured in coming in contact with a telephone wire which had fallen upon the defendant's trolley wire, and the negligence complained of was the failure of the street railway company to put guard wires over its trolley wires so as to prevent the telephone wires from coming in contact with the trolley wires. The judge, upon the trial of the case, instructed the jury that such failure constituted negligence as a matter of law and practically told the jury to return a verdict for plaintiff. Upon appeal to the Supreme Court, Newman, J., who rendered the opinion, says:

"In the present condition of the science and of the practical knowledge on this subject it can not be said, as a matter of law, what method of guarding the wires shall be required, nor whether any guards shall be required; for it is not known to the law that any method now known will prove effective. But it is a question for the jury, under all the facts in the case, to determine whether the method actually used was negligent. The trial court treated this question as one of law. He instructed the jury, in effect, that guard wires placed over the trolley wires is the approved method of protecting the telephone wire, in such places, and refused to submit to the jury in the special verdict the following question proposed by defendant: 'Did the defendant in the construction and operation of the street railway in question exercise such care and prudence for the safety of persons using the highway as men of ordinary intelligence and prudence engaged in operating the railway in question would have exercised at the place in question?' The instruction virtually took the question of defendant's negligence from the jury. The refusal to submit the question asked withdrew it altogether from the jury. The question of defendant's negligence is always for the jury, unless the negligence is so clear from the evidence that intelligent minds can not fairly form different conclusions upon it. The question was a proper one to be submitted in a special verdict. It related to a material issue of fact, and one upon which the case in a large measure turned. Both the charge upon this point and the refusal to submit this question were error. This is in no way inconsistent with what was decided in *State v. Janesville Street Railway Company*, 87 Wis., 72 (57 N. W., 970). That case was on demurrer to the complaint. The action was mandamus to compel the railway company to put guard wires above its trolley wires at crossings. An ordinance of the city required it. The complaint alleged the ordinance, and that guard wires are the proper and approved

method of preventing danger from the falling of the telephone wires upon the trolley wires. These facts were admitted by the demurrer. The case in no way involved the decision of the question whether guard wires are the proper method, or whether it is negligence to omit the guard wires."

Not only in the case of *The State, ex rel Wisconsin Telephone Company, v. Janesville Street Railway Company*, 87 Wis., 75, but in many other cases it has been held that an ordinance requiring the company to put up guard wires is a reasonable provision and that is the general holding upon that question (31 L. R. A., Note, pages 582-583, etc.) If such an ordinance of a municipal corporation would be a reasonable provision, can it be said that, when a jury under all the circumstances of the case, finds that such provision should have been made by the companies to protect the traveler, its finding is wrong? Furthermore it is for the jury to draw the inference under a given state of facts, when fair intelligent minds would differ as to whether or not it was negligence. *Block v. Milwaukee Street Railway Co., supra*.

To the same effect is the case of *Cincinnati Street Railway Company v. Snell*, 54 O. S., 197.

We think the court was right in not taking the case from the jury and in also overruling the motion for a new trial.

It is hardly necessary for us to say that in such case both the railway company and the telephone company would be liable, and if jointly liable, they would be severally liable. *McKay v. Southern Bell Telephone Co.*, 19 Southern Reporter, 695; *City Electric St. Ry. Co. v. Conery*, 33 Southwestern Reporter, 426.

Judgment affirmed.

Wm. G. King, for plaintiff in error.

N. H. Bostwick, for defendant in error.

MANAGEMENT OF SOCIETIES.

[Circuit Court of Richland County.]

JOHN H. COSS V. MANSFIELD LODGE No. 56, B. P. O. E. ET AL.

Decided, 1902.

Secret Societies and Corporations—Management of Can Not be Interfered With by a Court of Equity—Except for Fraud of Collusion—Or Action in Excess of Corporate Power—Injunction Against an Expenditure Will Not Lie, Unless.

1. The management of a society or corporation will not be interfered with by a court of equity upon complaint of a member, unless it appear that there has been fraud or collusion, or action in excess of corporate power.
2. An injunction against a proposed expenditure will not lie unless the petition alleges affirmatively that the plaintiff has exhausted all the remedies provided by the constitution and by-laws of the organization.

John H. Coss brought suit against Mansfield Lodge No. 56, Benevolent Protective Order of Elks, a corporation, and George W. Herring, its treasurer, to enjoin payment by the lodge of the expenses of one George N. Clugston as a delegate to the meeting of the grand lodge. The ground of the suit was that the said Clugston was illegally elected. We quote from the petition:

“That said lodge is a subordinate lodge, and as such is a constituent part of the grand lodge of the Benevolent and Protective Order of Elks of America, which grand lodge is the source of said subordinate lodge’s authority, and the highest and most authoritative body of the organization, which grand body is composed principally of representative delegates elected by subordinate lodges authorized to be elected by virtue of the laws of the said grand lodge, which elections take place in each subordinate lodge at its last regular session in March of each year; that at the election of said Mansfield lodge on March 25, 1902, said George A. Clugston was declared elected wrongfully by a majority of said lodge, and thereupon objections and exceptions were taken to such wrongful proceedings touching his eligibility on the floor of said lodge in open lodge in due parliamentary form.

“The cause was duly appealed to the district deputy grand exalted ruler having jurisdiction in the premises, for his review and opinion on the case, by which said Clugston was declared ineligible to be elected to said office of representative at the time of said election, and the same declared null and void. Said case was then appealed to the grand exalted ruler, and referred to the proper grand lodge committee of the grand lodge for review, and to report findings to that body. Said grand exalted ruler nor said committee have not as yet made their respected reports either reversing or confirming said decisions so handed down by the district deputy grand exalted ruler, and the cause is still pending undisposed of, and can not be finally disposed of until the meeting of the grand lodge in July 24, 1903.

“The by-laws of said Mansfield lodge No. 56 provide for the payment of the ‘actual expenses’ to be paid to its representative delegate grand lodge, and said Clugston, as pretended representative delegate, has presented his bill for alleged ‘actual expenses,’ as alleged representative, in the sum of \$130.65, and said lodge is about to allow and pay same as such to him, before said cause has been finally adjudicated, and before it is determined whether or not he is the representative, and while said cause is still pending undecided, of all of which said lodge and defendants have had notice.

“Plaintiff has done all he could do on the floor of said lodge in a parliamentary way to prevent the allowance and payment of said order and the payment of said bill.

“Unless the said lodge and said treasurer, defendants, are restrained from so doing, said alleged expenses in said sum will be paid to said Clugston wrongfully and illegally, and said lodge will suffer great and irreparable injury, damage and loss thereby, he being insolvent as to having sufficient tangible property not exempt from execution unincumbered, subject to reimbursing said lodge were he declared in said final decision of said pending case to be not the representative aforesaid.

“Wherefore, plaintiff prays that said defendants and each of them be restrained and enjoined from paying over said money until after the decision aforesaid, and if he be declared to be not the representative, that the order be made perpetual, and for such other relief as may be proper and just.”

VOORHEES, J., and DONAHUE, J.

The motion for temporary injunction is overruled. The petition does not affirmatively state that plaintiff had exhausted all remedy open to him in the order, and the averment that “plaint-

1904.]

Richland County.

iff has done all he could do on the floor of said lodge in a parliamentary way to prevent the allowance and payment of said bill," is not sufficient for this purpose. If a court of equity has a right to interfere at all, clearly it can not do so until the plaintiff has exhausted all the remedy provided by the by-laws and constitution of such society, and in the absence of such averment the petition does not show any necessity for the interference of the court; neither will a court of equity interfere with the management of a corporation or of a society, unless the managing officers or stockholders are acting in excess of their corporate power, unless the petition avers collusion or fraud on the part of the managing agent or of a majority of the stockholders. This petition contains no such averment, and in the absence of such averment the court will not interfere to restrain the discretion of the managing agent or stockholders, in the absence of fraud or collusion, no matter how clearly it may appear that they are mistaken as to the best course to pursue.

In this case the act of payment is clearly not *ultra vires*, as the petition says that the by-laws provide for the payment of such expenses. The question as to who is entitled to receive such expenses is merely one of judgment and discretion, and so long as such judgment and discretion is exercised in good faith, and, so far as this petition is concerned, such is the case, a court will not interfere by injunction to direct what such society shall or shall not do.

These considerations dispose of the matter. We have not gone further into the consideration of the right of plaintiff to bring this action, or whether or not he should have brought it in his own name on behalf of the lodge, or on behalf of all others similarly situated.

Kerr & LaDow, for plaintiff.

W. F. Voegele and Cummings, McBride & Wolfe, for defendant.

SUFFICIENCY OF THE AFFIDAVIT UNDER THE BEAL LAW.

[Circuit Court of Franklin County.]

ANDY KAPPES V. THE STATE OF OHIO.

Decided, March, 1904.

Beal Law—Affidavit Charging Keeping Open on Sunday—Surplusage—Duplicity—Jurisdiction of Mayor—Prejudice—First and Second Offense—Demand for Jury.

1. An affidavit in the form used in this case is sufficient to support a conviction of keeping open on Sunday a room where intoxicating liquor is sold.
2. Under an affidavit in that form there is but one offense charged; all reference to the sale of liquor is mere surplusage.
3. The presumption is that the offense charged was a first offense, and if it does not affirmatively appear from the record that it was a second offense, the action of a mayor in overruling a demand for a jury will not be disturbed.

On August 4, 1903, an affidavit was filed before J. S. Ricketts, mayor of the village of Marble Cliff, in Franklin county, Ohio, the body of which contained the following language:

“J. W. Morgan, being duly sworn, saith that on the 2d day of August, A. D. 1903, the said day being the first day of the week, and commonly called Sunday, at the county aforesaid, one Andy Kappes, in the township of Clinton, did, unlawfully and knowingly, keep open a saloon on said day, and did then and there, unlawfully and knowingly, expose, sell and furnish, intoxicating liquors to be used as a beverage, said saloon being a place where intoxicating liquors are, on other days of the week, exposed for sale and sold for beverage purposes, and not being a drug store, and said Andy Kappes not being, then and there, a regular druggist, and not selling and furnishing said intoxicating liquors upon a written prescription of a regular practicing physician for medicinal purposes only, or for pharmaceutical, scientific, mechanical, or sacramental purposes, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Ohio.”

The cause came on for hearing and the defendant successively moved for a change of venue (1) because the mayor was prejudiced; (3) offered to waive examination and be bound

1904.]

Franklin County.

over to the police court of Columbus, Ohio; (4) demurred to the jurisdiction of the court; (5) demurred to the sufficiency of the affidavit; and (6) moved to quash the affidavit because it did not sufficiently charge the sale of intoxicating liquors on Sunday. These motions and demurrers were each, in succession, overruled, and then the defendant demanded a trial by jury, which was refused.

On trial before the mayor the defendant was found guilty of keeping open a saloon on Sunday, and was fined \$100 and costs. On error proceedings the court of common pleas affirmed the judgment of the mayor, and that judgment has been affirmed by the circuit court, Judge Wilson rendering the opinion as follows:

WILSON, J.; SULLIVAN, J., and DUSTIN, J., concur.

The plaintiff in error was convicted in the mayor's court of the village of Marble Cliff, in Franklin county, Ohio, of the offense of keeping open on Sunday a room where intoxicating liquors were sold.

He interposed a motion for a new trial, which was overruled.

A bill of exceptions was allowed and error prosecuted to the court of common pleas to reverse the judgment. The court affirmed the judgment, and error is prosecuted here to reverse the judgment of affirmance, as well as the judgment of the mayor's court. It is claimed that the trial court erred in overruling the motion of the plaintiff in error for a change of venue upon the ground that the mayor was a material witness for the defendant, without whose testimony he could not safely proceed to trial.

Without determining the question whether the statute providing for change of venue applies to the mayor's court, the hearing on this motion does not satisfy this court that the mayor was a material witness, or that the motion was made in good faith. The evidence tended to show prejudice, but that is not a ground for change of venue, unless it be in the citizenship, and the defendant be entitled to a trial by jury. The motion was properly overruled.

The defendant demurred to the affidavit for duplicity, and that it did not charge the offense of keeping open on Sunday.

The court overruled the demurrer. This was not error. The affidavit does not charge the offense of selling intoxicating liquors on Sunday. What is said in that regard could properly be treated as surplusage, or as descriptive of the kind of room that was kept open. The language negating the fact that it was a regular drug store is sufficient under the statute.

The defendant demanded a jury trial, which was refused. The mayor's court had jurisdiction to try the case, whether it was a first or second offense—the only difference being that he could try it without a jury if it was a first offense. In either case he had final jurisdiction. The question of the right of the defendant to a jury trial, was not, therefore, jurisdictional, and it is not necessary that the record should disclose that it was a first offense in order to give the court jurisdiction. But in order to find that there was error in overruling the demand for a jury, it must affirmatively appear of record that it was a second offense. That does not appear. The presumption is the charge was for a first offense. There was no error in the refusal of a jury trial.

We find no prejudicial error in the admission and rejection of evidence, and no error on the record.

The judgment is affirmed with costs, and remanded to the mayor's court for execution.

G. E. Trump, for plaintiff in error.

W. B. Wheeler and *M. E. Thraülkill*, for defendant in error.

1904.]

Lucas County.

**CONTRACT OF PURCHASE AND SALE EMBODIED IN
CORRESPONDENCE.**

[Circuit Court of Lucas County.]

THE TOLEDO PAPER BOX COMPANY V. THE AMERICAN ROLL WRAP-
PING PAPER CO.

Decided, January 25, 1904.

*Contract—In the Form of a Written Order for Goods—Accepted in
Writing—Can Not be Modified by Parol Evidence—Of an Oral
Agreement with Agent or Seller as to Time of Delivery.*

Where a written order for goods, stating the time when the goods shall be shipped, is accepted in writing, but with a modification as to the time of shipment, with respect to which modification the party giving the order makes no objection, and such written communications contain all the essential terms and elements of a contract of sale, and no mention is made therein of prior oral negotiations or agreement between the purchaser and the agent respecting the time of shipment, parol evidence is not competent to support a claim by the purchaser that a different time for the shipment of the goods was agreed upon orally between him and the agent of the seller, and that his subsequent order was given in pursuance of and was based upon such prior oral agreement.

PARKER, J; HAYNES, J., and HULL, J., concur.

The American Roll Wrapping Paper Company recovered a judgment in the court of common pleas against The Toledo Box Company, on account of some paper of a special sort which was ordered by the plaintiff in error from the defendant in error and received by it. By way of cross-petition, or counter-claim rather, the plaintiff in error claimed damages on account of delay in furnishing this paper; it claims that it was to have been furnished within a certain number of days after the order was given and that it was not then furnished; that it was not furnished until some months after, whereby it lost the use of it and so it became dead and useless material upon its hands and it was subjected to a financial loss.

It appears that the order given by plaintiff in error was in writing, sent by mail. It described the paper that it desired,

set forth the price that it expected to pay and set a time for the delivery of the paper. The order was accepted by a written communication, but with a qualification as to the time of delivery. The paper was not forthcoming at the time promised by this written acceptance—though that time was not made very definite—and the parties had a great deal of correspondence, the box company urging the paper company to forward the paper and the latter company promising from time to time that it would have the paper sent forward in a short time, in a few days, setting different dates and times; but it seems according to these letters and the evidence in the case, to have been delayed by the breaking down of machinery in the factory, and in other ways; and after a while the box company canceled the order and the paper company recognized the cancellation. Then the paper box company wrote forward again to the paper company saying that if it could ship a part of the paper by a certain date, it might re-book the order, and the order was then re-booked, and there were more delays and further correspondence on the subject, and finally the paper was received, but after the resulting loss and damage as claimed by the plaintiff in error. The paper box company claims that this paper was to have been delivered to it or shipped to it within six days time after the order was given. In support of this contention it offered to prove that in conversations and oral negotiations between an officer of the box company and the agent of the paper company, at the place of business of the former, in Toledo, some time before this written order was sent forward, the agent of the paper company had agreed that if the order should be placed with the paper company the goods would be furnished within six days. This offer to prove was rejected by the court, the court holding that the evidence as to the oral negotiations and oral agreement was inadmissible under the circumstances, because the order and the acceptance, taken together, amounted to a complete contract in writing; and because of the exclusion of this evidence the box company was not able to make the case that it undertook to make upon its counter-claim. The result was that the jury was directed to return a verdict in favor of the paper company; and it is on account of this ruling that the plaintiff in error prosecutes error in this court.

1904.]

Hamilton County.

I shall not take time to read this correspondence. I have stated, in a general way the tenor and effect of it, and we simply announce our conclusions upon it as follows:

Where a written order for goods, stating a time when the goods shall be shipped, is accepted in writing, but with a modification as to the time of shipment, with respect to which modification the person giving the order makes no objection, and where such written communications contain all the essential terms and elements of a contract of sale, and no mention is made therein of prior oral negotiations or agreements between the purchaser and the agent of the seller respecting the time of shipment, parol evidence is not competent to support a claim by the purchaser that a different time for the shipment of the goods was agreed upon orally between him and such agent of the seller, and that his subsequent written order was given in pursuance of and was based upon such prior oral agreement. The admission of such evidence would be a violation of the well settled rules respecting the admission of oral evidence to modify the terms of a written contract subsequently executed and by its terms covering the whole subject-matter. We hold that the ruling of the court of common pleas upon this matter was correct, and the judgment of that court will be affirmed.

Lewis W. Morgan, for plaintiff in error.

William H. A. Read, for defendant in error.

DAMAGES TO PROPERTY LYING BELOW GRADE.

[Circuit Court of Hamilton County.]

MATILDA SHARP v. CITY OF CINCINNATI.

Decided, April 11, 1904.

Incomplete Record—Necessary Findings Will Be Presumed—Only Affirmative Errors in Charge Can Be Considered—Damages from Surface Water to Property Below Street Grade—Property Owner Can Not Complain of Burden Incident to Low Location, When—Doctrine of Civil and of the Common Law—Negligence of a Vis Major as a Proximate Cause.

1. Where a record does not contain all the evidence, a reviewing court must presume every finding of fact necessary to support

- the verdict and judgment, and where a portion of the charge of the court is omitted only affirmative errors can be considered.
2. There can be no recovery from a municipality for property damaged by surface water, simply because it lies lower than the grade of the street.
 3. It is immaterial in such a case whether the doctrine of the civil or of the common law is applied, where a charge puts the question squarely to the jury whether the damages were due solely to the low situation of the property.
 4. Where one has negligently failed to perform a duty which he had contracted to do, he will not be allowed to take refuge in an inquiry whether his own negligence or a *vis major* was the proximate cause of the resulting injury; but where the injury was proximately caused by the act of God, the law does not concern itself with duties the observance or breach of which had nothing to do with the damage.

JELKE, J.; GIFFEN, J., and SWING, J., concur.

As the record does not purport to contain all the evidence we must presume every finding of fact necessary to support the verdict and judgment. Neither does the record contain the whole charge, so we can not consider any errors of omission complained of, but must confine ourselves to affirmative errors, if any, committed in the general charge or in the giving or refusing special charges asked for.

The two errors relied on are presented by special charges given at the request of defendant and excepted to by plaintiff, and it is complained that these errors are further carried into the general charge.

The trial court gave the following special charge:

“If you find that the property of the plaintiff was located below the grade of East Third street, and that the same would not have been damaged had it been on the level with Third street, then I charge you, gentlemen of the jury, that the plaintiff can not recover.”

We find no error in this charge.

Of course if the issue is complicated with other elements, such as negligence on the part of the city in constructing the street, and street drainage, or the city is charged with collecting the surface water from a large area and by building the street diverting it upon plaintiff's land, other and different principles of law apply.

1904.]

Hamilton County.

But, taking the case simply, if the plaintiff's property is damaged because it lies low, that is not the city's fault; plaintiff's property must bear the burden of its unfortunate situation.

When the city built and improved East Third street, if it changed and raised the grade, thereby making plaintiff's property low, plaintiff was entitled to compensation, and either recovered compensation from the city or waived the same.

When that matter was closed, either by payment or waiver and the street was built, the reciprocal relations again became as though the topography was natural, and plaintiff thereafter could not complain of the burdens incident to the low location of her property. Elliott on Roads and Streets, Section 470, says:

"A city is not however liable merely because water collects on land in consequence of its being lower than the grade of a street which the city had a right to establish," citing cases.

Tiedeman on Municipal Corporations, Section 354a:

"Where the authority is vested in the municipal corporation, by charter or statute, to improve streets and establish street grades, and, in the exercise of that power, changes are made in the surface of the city's highways by which surface water is caused to collect on, or flow over, the adjacent land of private owners, there is no implied liability on the part of the municipal corporation for such indirect and consequential injuries, provided the city does not exceed its lawful power.

"So, also, it has been held that, ordinarily, there is no obligation on the city to provide drainage for the surface water upon its unimproved or unguarded streets; and when a city has begun the process of grading, it is under no implied liability to keep open former existing drains, or to construct new drains in their place, in order to prevent the surface water from overflowing land which may be situated below the level of the highway. Upon this point the decisions are far from harmonious, many cases holding that the city, when practicable, should provide drains and culverts. Many cases go further, and deny any implied liability, where, in making local improvements, which are legally authorized, surface water is made or permitted to flow from the street directly upon the adjoining property," citing cases.

Dillon on Municipal Corporations, Section 1051, says:

"But since surface water is a common enemy, which the lot owner may fight by raising his lot to grade, or in any other proper manner, and since the municipality has the undoubted right to bring its streets to grade, and has as much power to fight surface water in its streets as the adjoining private owner, it is not ordinarily, if ever, impliedly liable for simply failing to provide culverts or gutters adequate to keep surface water off the adjoining lots, *below grade*, particularly if the injury is one which would not have occurred had the lots been filled so as to be on a level with the street. The cases are not in harmony on the point last presented, but the above is believed by the author to be the correct doctrine."

Counsel for plaintiff object to this statement from Dillon because it is based on the common law and say that the rules of the civil law as to the surface water obtain in Ohio, citing *Crawford v. Rambo*, 44 O. S., 283:

"The difference arises as to surface water. In some of the states the rule of the civil, and in others that of the common law, prevails. The former requires each tenement to submit to the conditions imposed on it by nature, so that the owner of a lower tract can not divert the water that flows to and upon his own from a higher one to the injury of the latter. This rule was recognized by this court in *Buller v. Peck*, 16 Ohio St., 334, and was adopted as the rule of its decision in *Tootle v. Clifton*, 22 Ohio St., 247.

"The civil law acts upon the maxim that water is descendible by nature, and that its usual flow should not be interfered with, so that its burden, if it be one, should be borne by the land where it naturally flows, rather than by land where it can only be made to flow by artificial means. The common law does not recognize this principle as to surface water, but permits any one to protect his own premises from it as he may choose to do, without becoming liable to others injured thereby; or, more properly, it does not regard it as an injury to do so, whatever inconvenience or loss may result to others therefrom. It is not necessary, as we have said, to discuss the merits of either system in this case, as the injury complained of does not arise from an interference with the flow of surface water."

However, the Supreme Court said in *Springfield v. Spence*, 39 O. S., 671:

"The owner of private lots can raise the same to grade if he so desires, and can thus keep out all surface water; but the

municipal government has neither the interest nor the right thus to improve and protect private property. If the city could thus improve private lots, its power might become oppressive; and if the private person could thus compel the city to care for his private interests, its weakness might become ruinous. The law protects each in the proper exercise of rights, and excuses many omissions."

The charge puts the issue fairly before the jury: Was the damage caused solely by the low situation of the property? And the best test of this is by asking, Would the damage have occurred if the property had been on the level with Third street?

On this issue it makes no difference whether the doctrine of the civil or the common law is applied.

The next error charged is against the following special charge:

"If you find from the evidence that the damage to the property of plaintiff was caused by an extraordinary and unprecedented rainfall, then I charge you, gentlemen of the jury, that the city of Cincinnati, in the absence of negligence, is not liable, and that the plaintiff can not recover any damages."

It is not said that this proposition is erroneous, but it is contended that the converse of the proposition should have been given and it is complained that the general charge fails in this regard, and that it should have been charged that if the city was guilty of negligence it would be liable and in that case the act of God would be no defense irrespective of any question of proximate cause.

Counsel for plaintiff in error urge that—

"The intervention of the act of God will not be a defense when the negligence of the defendant combined therewith to cause the damage."

The cases cited are obscuring and misleading because they are common carrier cases or cases based on contract.

There is a fundamental difference in setting up the act of God as a defense in cases involving negligence of a duty imposed by law and cases involving negligence of a duty based on contract.

In the former the question of proximate cause is an essential element of liability or defense and in the latter it makes no difference.

Where on contracts to do a thing, without reservation, he should be held to its performance no matter what intervenes. But the law in some cases as in that of common carriers, has been more gracious and has said that where one has been prevented from doing what he contracted to do by a *vis major*, he may set this up as a defense, relieving him from liability. But this grace will not be extended to one who has been negligent. Where one has negligently failed to perform a duty which he has contracted to do, he will not be allowed to take refuge in an inquiry whether his own negligence or a *vis major* has been the proximate cause of a resultant injury.

As to a duty imposed by law it is quite otherwise. Duties imposed by law are duties implied from the facts, circumstances and relation of the parties.

Now, where damage has proximately been caused by an act of God, the law does not concern itself in implying duties the observance or breach of which had nothing to do with the damage. The law makes no immaterial implications. See Am. & Eng. Encyl. Law, 2d Ed., Vol. 1, p. 592.

The charge given gave to plaintiff the full benefit of all she was entitled to under this aspect of the law, and the proposition asked for by counsel for plaintiff would have been misleading and erroneous.

On account of the condition of the record the judgment in this case could only be reversed for such affirmative prejudicial error appearing as could not be cured by subsequent addition, correction or explanation, as we are bound to presume that any necessary curing addition, correction or explanation was there, and as we find no such error, the judgment will be affirmed.

Charles E. Tenney and Norwood J. Utter, for plaintiff in error.

Frank H. Kunkel, contra.

NOTICE AS TO A DANGEROUS CONDITION.

[Circuit Court of Cuyahoga County.]

GREELEY BROS. CO. v. STANISLAS ZEITHAML.

Decided, December 24, 1903.

Negligence—In Creating a Dangerous Condition—Smouldering Fire in a Heap of Refuse—Child Burned While Playing on the Heap—Smoke from the Heap Seen by a Teamster—Not Knowledge of His Employer of a Dangerous Condition.

Debris and filth from city streets was collected by wagons belonging to G and deposited on an uninclosed lot. Fire had smouldered in this heap for some days, and had partially undermined it. A child climbed upon it and fell through into the fire.

Held: That the fact that teamsters employed by G may have seen the smoke issuing from the heap did not amount to notice to G of a dangerous condition, and such condition not being one which could have been reasonably anticipated, and there being no proof that G was aware of fire in the rubbish, no liability attached for the injury to the child.

MARVIN, J.; HALE, J., and WINCH, J., concur.

Error to the court of common pleas.

Suit was brought in the court of common pleas by the defendant in error through a next friend. The plaintiff below, Stanislas Zeithaml, was about seven years old when the injuries complained of in his petition were received. The parties will be spoken of in this opinion as they were in the original action.

In the summer of 1900 the defendant, a corporation, was engaged with teams and proper appliances in removing filth and debris from certain streets of the city of Cleveland, and, by some arrangement with the owner, was depositing the material collected from the streets upon a vacant lot at the southeast corner of Cedar and East Madison avenues. This field contained several acres, was unenclosed, and was bounded on two sides by the public streets already named. Across this field from the northeast to the southwest corner was a well-beaten footpath over which, for several years, pedestrians had been accustomed to pass without any let or hindrance, in very considerable num-

bers, and the field was a common playground for the children in the vicinity, and had been so for a series of years. This fact was so universal that it must have been known to the owner and to the officers of the defendant.

Prior to the time of the injuries complained of the defendant had deposited of this refuse material taken from the streets a large amount, making a heap of considerable height and dimension. This was immediately adjoining the pathway already referred to. For several days, probably not less than five and perhaps as much as a week before the accident complained of, this pile had been on fire. It was a smouldering fire, and seems to have been altogether covered up by the stuff of which the pile was constituted, deposits being made to the amount of at least two wagon loads daily. This smouldering fire sometimes sent forth smoke in considerable quantities so that it was noticed in the neighborhood, but, as already said, the fire itself was not visible, and smoke was emitted so as to be noticeable only a part of the time. Some of the time there was no appearance whatever of smoke.

On July 6, 1900, the plaintiff and other children, his companions, were playing on this lot, and while engaged in play went upon the top of this heap, the surface of which had been so undermined by the fire that it broke through and let the plaintiff into the smouldering fire, whereby he was burned and injured. The suit was brought to recover damages for such injuries, and resulted in a verdict for the plaintiff. A motion was made to set aside the verdict and grant a new trial, which was overruled, and judgment was entered upon the verdict.

Complaint is made by the defendant that there was error in the charge of the court, to its prejudice. The charge has been examined with care, and we think was as favorable as the defendant was entitled to.

Complaint is further made that the court erred in overruling the motion for a new trial, upon the ground that the verdict was not sustained by sufficient evidence. It is urged that there is no evidence to show that the defendant set the rubbish on fire, or that it had any knowledge that there was any fire in that heap; that it had no reason to anticipate a fire, and, there-

1904.]

Cuyahoga County.

fore, can not be held responsible for the injuries received from such fire.

On the other hand it is urged that whether the defendant set the fire or not, the fact that smoke was emitted from the heap during a part of the time, and that the teamsters in charge of the wagons of the defendant deposited rubbish at least twice a day upon the heap was sufficient to charge the defendant with constructive notice of the condition of this pile of rubbish. Attention is called to authorities to the effect that one being responsible for a dangerous condition is chargeable with the consequences of such condition, and it is urged that the cases apply to the case now under consideration.

One of the cases noted is that of *Penso v. McCormick*, 125 Ind., 116 (25 N. E. Rep., 156, 157). The syllabus of that case reads:

“Where the proprietors of a sawmill situated in the public part of a town, near to a public highway, had by their knowledge and acquiescence given license to children of tender years to use their uninclosed lot surrounding the mill as a playground, and without any warning to them or others, constructed a pit-fall in the ground where such children were accustomed to play, which they filled with burning embers and which gave forth no signs of its condition, or the danger in stepping upon its covering, and while in this condition a child of tender years entered upon it, as he was accustomed to do, without any knowledge of its changed condition, and was severely burned and injured, they were liable under such circumstances to respond in damages. Greater care must be exercised in dealing with children of tender years than with older persons who have reached the age of discretion.”

The fact in this case, as stated by the court in the opinion, is, that the mill yard was a place where children were accustomed to play. That fact was well known to the mill owners and acquiesced in by them for a long period, and that “without any notice or warning, the appellees (mill owners), on the day of the injury, had excavated a hole or pit in one side of the heap or mound, and refilled it with hot and burning coals, embers and cinders, the top of which immediately cooled, and gave no signs of any change in the condition of the mound, or any warning

of danger to those who had been accustomed to pass over or play upon the mound." The court in *this* case quoted with approval from the case of *Young v. Harvey*, 16 Ind., 314, 315, this language, speaking of the right of one to recover for injuries sustained by a pitfall left unguarded in an open hole which the public were, by acquiescence on the part of the owner, permitted to use it as a common:

"Whether it can be, or not, depends upon the degree of probability there was that such accident might happen from thus leaving exposed the partially dug well, considered, perhaps, in connection with the usefulness of the act or thing causing the danger. If the probability was so strong as to make it the duty of the owner of the lot, as a member of the community, to guard that community from the danger to which the pit exposed its members, in person and property, he is liable to an action for loss occurring through his neglect to perform that duty."

In *Harriman v. Railway Co.*, 45 Ohio St., 11, this language is used in the syllabus:

"Where a railroad company has for a long time permitted the public, including children, to travel and pass habitually over its road at a given point, without objection or hindrance, it should, in the operation of its trains and management of its road, so long as it acquiesces in such use, be held to anticipate the continuance thereof, and is bound to exercise care, having due regard to such probable use, and proportioned to the probable danger to persons so using its road."

In this case suit was brought for injuries to a boy about ten years of age who was upon the right of way of the defendant at a place where the public had been so long accustomed, with the knowledge and acquiescence of the railway company, to cross said right of way that the same amounted to a license to the public. A torpedo was left upon the track carelessly and negligently, and where there was no occasion for it to be. It was, to all appearance, entirely harmless, whereas in fact it was a very dangerous thing to handle. This was picked up by a boy about the age of plaintiff and exhibited by him to the plaintiff, and they undertook to open it, which caused its explosion and the injury to the plaintiff, and it was held that such facts entitled the plaintiff to a recovery.

The case of *Findlay Brewing Co. v. Bellman*, 9 C. C., 277, shows this state of facts: The brewing company placed in the street at the side of the brewery building a tank sixteen feet in length, three feet ten inches high and some four feet wide, into which it was accustomed to convey by a spout the hot "mash" from its brewing tubs, from whence it was taken, when cool, by a party to whom the company had sold the same. A boy six years of age went with another boy to this tank, and they got upon the edge of the box or tank to see the "mash" run into it. This boy, six years old, slipped into the hot "mash" and was injured. It was there held that the company was liable.

None of these cases seem to us to go to the extent of sustaining the verdict in the case under consideration. In each one of the cases the dangerous condition which brought about the injuries complained of was known, or by any kind of care would have been known to the defendant.

In *Findlay Brewing Co. v. Bellman*, *supra*, the brewing company knew of the fact of hot mash being stored in this tank, and that it was at the side of the public highway; that it would be natural for children to be climbing up its sides and that they would be likely to fall into the scalding matter and be injured.

In *Harriman v. Railway Co.*, *supra*, the railroad company, by its servants, placed the dangerous instrument at a point where children were accustomed to be with its acquiescence. They knew that the torpedo was highly dangerous and that there was nothing to indicate its dangerous character to an inexperienced child.

In *Penso v. McCormick*, *supra*, the defendants themselves placed the burning material in a place dangerous to children whom they knew were accustomed to play there.

In the case of *Ann Arbor Ry. Co. v. Kinz*, 68 Ohio St., 210, this language is used in the syllabus:

"The owner of an uninclosed tract of land within a city, which has been graded to a level, leaving a bank on one side of the premises, to which premises adults are not invited, but suffered to resort for the purpose of playing base ball, which amusement attracts to the ground and along the bank young boys to witness the games, is not liable for injury to one of such

boys, caused by the caving or falling of the top of the embankment, where its condition does not, to the knowledge of such owner, indicate a reasonable probability of such result."

In the opinion in this case Judge Price makes use of this language, page 223:

"We think the better and more reasonable proposition is, that the owner of the property owes no general duty to keep it in condition which will insure the safety of persons who go upon it without invitation or license; yet if he keeps upon his premises, dangerous machinery, or other things likely to attract children, and does not guard them to prevent injuries to them, he is liable for injuries resulting from his neglect to provide such guards. One of the reasons assigned for this rule by some authorities is that the keeping on the premises a machine or other thing which naturally entices the very young and curious, and thus attracts their presence, may be construed as an implied invitation to enter the premises so occupied by the dangerous machine or other device, in which case it becomes the duty of the owner to see that the person thus invited is not placed in peril.

"But it is not our duty to pursue these various cases and authorities as they meet or diverge, for we have no case here calling for such labor. The facts before us show no secret dangers, traps, or pitfalls, and the premises were not in a dangerous condition; nor did the owner place or maintain thereon any object or thing to attract the young and unwary." See, also, *Erickson v. Railway Co.*, 82 Minn., 60.

In *Shearman & Redfield on Negligence*, Section 705, this language is used, and seems to us to state clearly the law as it ought to be:

"The owner of land, where children are allowed or accustomed to play, particularly if it is unfenced, must use ordinary care to keep it in a safe condition, for they, being without judgment, and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees. And yet merely allowing children to play upon a vacant lot is held not to amount to an invitation which creates liability for its condition."

In this case it can not be supposed that the defendant would anticipate the fire which brought about the injuries to the plaintiff, and that being true, it can not be held liable unless it had

1904.]

Hamilton County.

either actual or constructive notice that such fire was in progress. We find nothing in the evidence which can fairly be held to be such notice. No officer of the company saw, so far as it appears, any smoke arising from this heap, or was where he would be likely to see it. The teamsters working for the defendant may be said to have probably seen at some time the smoke arising from this heap, but we know of no rule of law which would make the knowledge of such employe either actual or constructive notice to his employer. We hold, therefore, that there was error on the part of the court in overruling the motion for a new trial, on the ground that the verdict was not sustained by sufficient evidence. The judgment of the court below is reversed and the case remanded to that court.

White, Johnson, McCaslin & Cannon, for plaintiff in error.

Toland & Howell, for defendant in error.

WAIVER OF LIMITATION AS TO STREET ASSESSMENT.

[Circuit Court of Hamilton County.]

R. H. THORNTON ET AL V. CITY OF CINCINNATI.

Decided, April 5, 1904.

*Street—Constitutional Limitation on Assessment for Improvement of
—Effect of Petition for Improvement—Estoppel.*

1. The constitutional limitation as to the amount of assessment for a street improvement may be waived by contract or by the conduct of the parties *in pais*.
2. A petition for a street improvement is without significance, if it does not give to the city the right to do more than could be done without it, and where a petition is not needed to confer jurisdiction, but its sole office is to avoid and surrender the constitutional limitation with reference to the amount of the assessment, the signers are estopped from setting up the limitation.
3. A trial court may hear evidence and find the amount of special benefits, and then say that up to this point we will not enjoin, but beyond it we will; but where the assessing board has made a finding of benefits and has fixed the assessment on that basis, such finding should not be lightly disturbed.

JELKE, J.; GIFFEN, J., and SWING, J., concur.

The petition to the Board of Administration under which this improvement was made reads as follows:

“We, the undersigned, owners of property represented by the feet front abutting upon Fairview avenue from the south end thereof to Straight street, hereby petition your honorable body for the improvement of said Fairview avenue between the points aforesaid, by asphalt pavement and granite curbs, the roadway to be forty feet in width, to such changed grade as your board may establish. And we respectively agree not to make any claim for the damages on account of such changed grade, and for the assessment for the whole cost of such improvement except fifty per cent. of the entire cost of the improvement and the cost of intersections, to be made and collected in ten (10) equal annual installments; and in case the bonds of the city are issued in anticipation of the assessment thus petitioned for, then that the interest on said bonds be collected in ten (10) installments, the same and in like manner as the assessment installments aforesaid, or that the interest installments be numbered and assessed according to the number of years the bonds may have to run.

“And in consideration of the city’s making said improvement, we and each of us further agree with each other and with said city, and we jointly and severally bind ourselves, to pay such assessment irrespective of the number of owners of property signing this petition.”

Counsel for the city claim that by reason of signing this petition the signers thereof are estopped from setting up any statutory or constitutional limitation on the amount of the assessment and from claiming that such assessment should be anything less than actual cost, or that the same exceeds the special benefits to their respective properties. Counsel for plaintiff’s herein, signers of said petition, claim that they are not so estopped and rely upon the case of *Birdseye et al v. The Village of Clyde et al*, 61 O. S., 27. Special emphasis is laid upon the language of the Supreme Court on page 38:

“And it can hardly be supposed that the plaintiffs who signed the petition for the improvement intended thereby to donate their entire property to the public, or, what is practically the same thing, consent to an assessment that would amount to its confiscation. They evidently contemplated that some special

1904.]

Hamilton County.

benefit would accrue to them from the construction of the improvement, which could not possibly be the case if the substantial value of their property were taken to pay the assessment laid down upon it. The petition must be construed in the light of this situation, and so as to effectuate the manifest intention of the parties."

The improvement in the village of Clyde was made under a special act (90 O. L., Local, page 434), which among other things provides:

"Provided, however, that two-thirds of the cost for improvement and paving any street, and of constructing a sewer under such paved part, for which said street improvement fund shall be used, shall be assessed on the real estate bounding and abutting thereon, and according to the foot frontage of the real estate so bounding and abutting as provided by the laws of the state of Ohio."

The Supreme Court expressly holds that the reference to "the laws of the state of Ohio" brings Revised Statutes, 2270, into contemplation and makes it part of the body of law applicable to the improvement in the village of Clyde. Revised Statutes, 2270, provides a limitation of twenty-five per centum of the tax value of the property on assessments.

The Supreme Court does not deny the application of the doctrine of estoppel in the Birdseye case, but says that the estoppel shall not extend beyond the *intention* which the court finds in the paper which the property owners signed. The court finds that said petition was signed with the limitation of Revised Statutes, 2270, in view.

The case of *Birdseye v. The Village of Clyde* went to the Supreme Court from the sixth circuit. That case came on for application before the judges of that circuit in the case of *Harriet A. Blair v. C. K. Cary*, 2 C. C.—N. S., 25, and in the course of their opinion the court, per Parker, J., say on page 37:

"It is urged by counsel for plaintiff in error that the case of *Birdseye v. Village of Clyde*, 61 O. S., 27, is in point here and has some influence upon the construction of this provision of Section 2272, Revised Statutes, but we can not so understand it, and we do not think that is true. In that case the act under con-

sideration was a special act for the city of Clyde, and it contained no limitation whatever; it did not contain a provision, as this section does, that the assessment should be a valid lien against the property, although it might exceed twenty-five per centum of the value; it contained no provision upon the subject.

"Our construction of the law was that that being the only act invoked (the petition being under the act), and it containing no limitation, there was no limitation, and that, therefore, they might disregard the twenty-five per cent. limitation fixed in Section 2270, Revised Statutes. The Supreme Court, however, took a different view; it held that in the absence of any express provision, the limitation fixed by Section 2270, Revised Statutes, should be read into it and be considered as a part of the act, and that for the protection of persons proceeding under that special act as well as others. But here we have a case of an express provision applicable to the city of Toledo to the effect that notwithstanding an assessment may exceed twenty-five per cent. of the value, it shall be valid as against persons signing the petition; and we think, therefore, that the plaintiff has no ground of complaint upon that score."

The improvement in the case at bar was either made under Revised Statutes, 2272, or under the general powers of a municipality to make improvements and assess the cost thereof not exceeding special benefits on the abutting property irrespective of special statutory provision.

Revised Statutes, 2272, provides:

"When a petition subscribed by three-fourths in interest of the owners of property abutting upon any street or highway of any description between designated points, is regularly presented to the council for the purpose, the cost of any improvement of such street or highway may be assessed and collected in equal annual installments, proportioned to the whole assessment in a manner to be indicated in the petition, or if not so indicated, then in the manner which may be fixed by council."

It is said that three-fourths of the abutting front feet have not joined and hence this improvement and assessment can not have been under Revised Statutes, 2272.

But the signers of the above petition have expressly estopped themselves from making this objection having agreed with the

1904.]

Hamilton County.

city and each other "to pay such assessment irrespective of the number of owners of property signing the petition." Whether this improvement was made under Revised Statutes, 2272, or the city's general powers is all the same, because the objection here is that assessment beyond the special benefits is unconstitutional.

There is no doubt of this constitutional limitation, but this may be waived by contract, or parties by conduct *in pais* may estop themselves from setting it up. *State v. Mitchell*, 31 O. S., 592; *Tone v. Columbus*, 39 O. S., 281.

Now let us do here what the Supreme Court did in the Birdseye case, find out what the signers intended by what they said in the paper which they signed and then hold them bound by estoppel to that extent and no further. There is no ambiguity in what they said, they asked the city to make the improvement and said they would pay the whole cost thereof, less fifty per cent. and the cost of intersections. They said to the city we will be the arbiters of our own economy; we want this and we will pay for it, and we will take the chances and responsibility of our property being sufficiently specially benefited.

Else the petition would be a nullity and have no force and significance. The city could have done what the property owners say it could have done, without the petition as well as with it.

The petition in the Birdeye case had to be read with and have read into it the special law and all the other law which the special law drew into itself.

The petition in the case at bar was not needed to confer jurisdiction or power, its sole office was to avoid and surrender the constitutional limitation.

We find nothing in the case of *McGlynn v. Toledo*, 22 O. C. C., page 39, out of harmony with this conclusion. Hence we are of opinion that the signers of the petition in the case at bar are estopped from setting up the constitutional limitation of special benefits.

The assessment should be reduced by so much of the cost of intersections as was included therein.

Albert T. Brown, for plaintiff in error.

John V. Campbell and *Charles J. Hunt*, contra.

MARY H. BENHAM v. CITY OF CINCINNATI.

JELKE, J.; GIFFEN, J., and SWING, J., concur.

The conclusion reached in the Thornton case is applicable to this case also.

As to the power of the lower court to hear evidence as to the amount of special benefits, we said in the case of *Cincinnati v. Shoemaker*: "If the benefits conferred are equal to the assessment there is nothing to move a court of equity to intervene by injunction;" this was approved by the Supreme Court.

Of course a court can not make the finding and deny an injunction on that ground without hearing evidence as to the special benefits.

A corollary of the above is that a trial court may hear evidence of special benefits, find the same, and then say that up to this point we will not enjoin, beyond it we will, which is practically fixing the assessment. See *Schroder v. Overman*, 61 O. S., 1; *Walsh et al v. Sims, Treas.*, 65 O. S., 211; *Shoemaker v. City*, 68 O. S., 603.

Where, however, the assessing board has made a finding of benefits and has made the assessment on that basis, such finding and assessment are *prima facie* correct, and should not lightly be disturbed or inquired into in the absence of allegations of some of the grounds usually invoking equitable intervention.

Coppock & Hertenstein, for plaintiff in error.

John V. Campbell and Charles J. Hunt, contra.

NOTICE TO MUNICIPALITY OF DEFECTIVE SIDEWALK.

[Circuit Court of Cuyahoga County.]

JULIA PAYNE V. CITY OF CLEVELAND.

Decided, December 24, 1903.

Evidence—As to Notice to City of Defect in Sidewalk—Knowledge of a Policeman the Knowledge of the City, When—Rule of the Police Department as to Observing Defects, Competent.

1. A recognized rule of the police department, which requires policemen to note and make report, among other things, of "all coal holes left open," is competent as evidence in a suit against the municipality by one who has suffered injury by falling through an open coal hole in the sidewalk.
2. Where it is thus made the duty of a policeman to report a defect, and his attention has been called to a coal hole in the sidewalk with an insecure lid, which had tilted up from the weight of a pedestrian, causing him to fall into the hole, and the owner of the property or some one for him informs the policeman that he is unable to remedy the defect, the knowledge of the policeman becomes the knowledge of the city, and evidence of such knowledge is competent in a suit for damages by one who subsequently fell into the same hole.

MARVIN, J.; HALE, J., and WINCH, J., concur.

Julia Payne brought her action against the city of Cleveland to recover damages for injuries sustained by her from falling into a coal hole in the sidewalk on Pearl street near the corner of Bridge and Pearl streets in said city, by stepping onto the cover of said hole, which thereupon slipped in such wise as to leave said coal hole open. This was on June 25, 1895. The hole was in front of a brick block owned by one Henry Heil. The excavation under the sidewalk was made by said Heil under permission granted for that purpose by the city. The covering over said coal hole was an iron plate, and it is charged in the petition that said hole so covered was at the time of the injury to the plaintiff a public nuisance in that the cover thereto had become and was worn and loose in the rim surrounding it, whereby said cover had become ill-fitting and insecure, and that by reason of the shallowness of the rim around said hole into

which said worn and loose cover was allowed to rest it had become easily liable to displacement when trodden upon, and was therefore highly dangerous and unsafe for persons along said sidewalk unless securely fastened from beneath, and that said cover was and for more than a month prior to the injury to the plaintiff had been wholly unfastened, unguarded and insecure, and that such condition of insecurity was at the time of the accident and for a long time prior thereto well known to said city and its officers, and wholly unknown to said plaintiff.

The defendant answered by a general denial, and further by an allegation that if the plaintiff was injured at the time and place charged in the petition said injury was contributed to by her own negligence.

Upon the trial of the case, at the close of the plaintiff's evidence, the defendant moved for an order directing the jury to return a verdict for the defendant, which was granted. This action of the court is complained of by the plaintiff in error, as well as certain rulings upon the introduction of evidence.

A bill of exceptions is filed here containing all the evidence introduced on the trial. From this it appears that the injury to the plaintiff occurred between three and four o'clock on the afternoon of June 25, 1895; that the sidewalk in front of the Heil building, where this injury occurred, was a broad flagstone walk; that there were five manholes in front of said building opening into coal vaults beneath; that Pearl Street is a principal street of the city, and used very extensively by pedestrians and vehicles; that as the plaintiff was walking along the sidewalk she stepped on the cover of this manhole, which immediately tilted and slipped out of place, whereby she dropped into the coal hole, catching upon her arms on the cover and sidewalk, but was unable to extricate herself and was helped out of this perilous position by two men. Her injuries were very considerable. There is nothing in the evidence tending to show any negligence on the part of Mrs. Payne. The evidence tended to show that, though there was a chain suspended from the under side of this cover, there was no weight attached to such chain. The fact that the cover tilted and slipped by her stepping upon it certainly tended to show that it was in-

1904.]

Cuyahoga County.

secure and in an unsafe condition at the time of the accident, and the fact, which was testified to by witnesses, that another woman fell into this hole under similar circumstances on June 15, 1895, and still another on May 20 of the same year tended to show that this unsafe condition had existed for a considerable time. It is true that the fact of the covering being removed temporarily on each of these days for the purpose of putting in coal or for some other purpose and not immediately secured after being again placed over the hole might not be such negligence in the manner of protecting this sidewalk as would make the city liable, because the city might presume that the weight to be attached to the chain would be immediately so attached; but if the fact was known to the city that these two previous accidents had occurred within so short a time, and if the city was further notified that the owner had not or could not or did not intend to remedy the defect, then we think the city would clearly be liable for any accident resulting from this dangerous condition of the coal hole. But where the injured party was without fault, it is claimed that no notice of such previous accidents or of the fact that the owner did not immediately after each accident properly fasten the cover is shown by the evidence.

It appears by the fifth page of the bill of exceptions that while Mrs. Pauli, a witness for the plaintiff, was being examined, she testified to having fallen into this same hole on or about June 15 of the same year, about ten days before the plaintiff's accident occurred. She stepped onto this same cover, when it slipped and left the hole open so that her foot went into the hole, and she was prevented from falling by catching upon the sidewalk and being helped up by her daughter and another friend; that at the time of her accident a policeman of the city saw her and immediately talked with her about it. She was then asked to state the conversation she had with that policeman. This was objected to by the city and the objection sustained and a proper exception taken. Counsel for the plaintiff then stated that if the witness was permitted to answer he expected her to say that she told the policeman that she had just stepped upon the cover of that coal hole; that the cover was not fas-

tened or secured in any manner; that it tipped up and slipped out of place, and she fell into the coal hole; that thereupon the policeman went into the store in front of which was this coal hole, and a man came out and was shown the coal hole with the cover off, by the policeman, and was told by the policeman that he must fasten or secure it, and the man then told the policeman that he could not fasten or secure it because the fastening was broken. The court then said to the jury, upon request of counsel for the city, that all that this witness had testified to in connection with a policeman should be disregarded by the jury, so that the ruling of the court was that the notice given to the policeman on or about June 15 of the condition of this opening in the sidewalk and the fact that the policeman immediately communicated that condition to some one there connected with the property and that the policeman was then informed that it was claimed by this man that the covering could not be safely fastened because the chain was broken, was wholly incompetent.

Before the evidence to which attention has just been called was offered, there had been offered in evidence on the part of the plaintiff a rule of the police force of the city of Cleveland, and it was conceded by counsel for the defendant at the time that said rule was one of the rules and regulations of the police force of the city of Cleveland, and that it was in force on June 25, 1895. Said rule, speaking of policemen, reads:

“He shall note all street and sidewalk obstructions, all defects therein from which accidents may occur, removing them when practicable and when necessary, and when no light is furnished place a good and sufficient light so that obstructions can be plainly seen; all premises for which temporary permits are granted for building or when openings or excavations are being made and not suffer them to be continued without the proper permits being granted authorizing the same, and shall cause suitable accommodations to be provided for the public travel; all coal holes being left exposed or unsecured, all street lamps not lighted at proper times or too early extinguished, when not clean or not giving sufficient light, all wooden buildings erected contrary to law or any building defectively built or becoming unsafe, or where any noisome, dangerous or unwholesome trade is carried on, and all nuisances or violation

1904.]

Cuyahoga County.

of the laws, ordinances and all other matters relating to the safety, health and convenience of the public or to the interests of the city, and in all cases of complaint by citizens with residence * * * shall make report thereof.”

To the introduction of this rule the defendant objected and the objection was sustained, to which a proper exception was taken.

As to the introduction of this rule, it is urged, among other things, that no evidence was offered tending to show that this rule was adopted or approved by the city council of the city of Cleveland, and that the council alone has the power to constitute a police officer an agent of the city for the purpose specified in said rule. It is admitted, however, that the department itself has the authority to prescribe rules for the government of the department and to lay down duties for the different members of the force to perform. It having been admitted that this rule was one of the rules and regulations of the police force of the city of Cleveland in force on the day when the accident to the plaintiff occurred, we think there was no occasion to inquire by whom that rule was adopted. It is a sufficient showing that it was adopted by the proper authority when the admission above referred to was made by the city. We think, therefore, that the court erred in excluding this rule. Its admission would have tended to show that whatever fact came to the knowledge of the policeman was by him reported to some authority that had the power to remedy the difficulty, for surely the presumption is, in the absence of any evidence to the contrary, that the policeman did his duty, and the requirement of the rule that he should make report must mean that he should make report to somebody who had some authority in the matter, otherwise such requirement would be absolutely a vain thing.

As against the argument that the city, if it had notice of what occurred to Mrs. Pauli on June 15, might rely upon the performance by the property owner of the duty imposed upon him of immediately making said covering secure, it seems clear that the fact which the plaintiff offered to show, that either the owner of the building or some person connected with such building notified the policeman that he could not repair it, would be

sufficient to require some action on the part of the city to make this place safe.

Attention is called by the defendant in error to the case of *Chase v. Cleveland*, 44 Ohio St., 505. That was a case brought against the city to recover for an injury received by falling upon a slippery sidewalk. The syllabus reads:

“In a suit against a municipal corporation to recover for injuries occasioned by falling upon a slippery sidewalk, allegations in the petition which aver that the defendant is a city of the first class; that the street where the accident occurred is a public highway within the corporate limits; that upon a sidewalk in front of property of a private owner, the city negligently suffered ice and frozen snow to accumulate, and for a number of days to be beaten smooth and slippery, and for that reason dangerous to those passing along it, and to so remain for some days, of which condition the city had or might have informed itself in time to have made the sidewalk safe before the accident, are not sufficient to show negligence.”

In the opinion, announced by Judge Spear, page 513, attention is called to the fact that the petition is very indefinite in charging that the dangerous condition of the walk had continued for a number of days. “The term, ‘a number of days,’ and ‘some days’ may mean two days, or more. Neither necessarily indicates a greater number than two.”

He says, speaking of this allegation as to the length of time, that they are “clearly insufficient to show notice to the city. So that the plaintiff is remitted, as to this essential element, to the allegation that it was possible for the city to have obtained the information. We do not understand that a city is bound at all hazards to have knowledge of defects in sidewalks. Municipal corporations are not insurers of the safety of their public ways, or of the lives and limbs of pedestrians. The law provides that such corporations shall have the care, supervision, and control of the streets, and shall cause them to be kept open and in repair, and free from nuisance. This requires a reasonable vigilance, in view of all the surroundings, and does not exact that which is impracticable. * * * They are not bound to use all possible vigilance in inspection or in obtaining inform-

1904.]

Cuyahoga County.

ation." It does not appear that this language in any wise tends to aid the defendant in error here.

The probability of the situation of the street rendered unsafe by snow and ice becoming known to the authorities immediately is, as Judge Spear seems to think, not probable, and he says that to give the city notice of all such unsafe places "would require a large special force involving enormous expense; * * * Such duties do not naturally fall within the province of the police force."

This doctrine does not seem inconsistent with the proposition that knowledge of such condition of the sidewalk as was shown in that case would not be knowledge of the city, but only that the police force would not be likely to know of all such conditions of the walk because it is not their province to look for such conditions.

In the case of *Western College v. Cleveland*, 12 Ohio St., 375, which was a suit brought by the college against the city to recover for loss sustained to the plaintiff's property by the violence of a mob which was not suppressed by the police, the opinion, by Judge Gholson, is to the effect that the city is not responsible because of the failure on the part of the police force to perform its duty in suppressing a riot. We are unable to see that there is anything in the case which implies that knowledge brought to the police is not knowledge brought to the city.

The case of *Wheeler v. Cincinnati*, 19 Ohio St., 19, simply holds that the failure on the part of the city to provide necessary agencies for extinguishing fires does not render the city liable for damages caused by such fires, nor does the negligence of those connected with the fire department render the city so liable.

We are unable to see that this in any wise tends to show that the city is not bound by the knowledge of its police officers. It is not sought here to charge the city for the failure on the part of the police officer to repair this sidewalk, but only to hold the city for its failure to repair the walk when knowledge of its dangerous condition was brought home to the officer whose duty it was, by a rule of the department, to communicate such knowl-

edge to the proper officers; but with this rule, we are inclined to think that the city was bound by the knowledge of the policeman.

In support of this attention is called to the case of *Denver v. Dean*, 10 Colo., 375. This was a suit brought by Dean for injuries sustained by stepping upon the covering of a coal hole in the sidewalk in the city of Denver. The chief of police of the city knew of the defect several months before the accident happened and had notified and instructed the tenants to have the defect cured. He had also mentioned it to the policeman stationed on that beat. Upon the trial the court instructed the jury:

“That the knowledge, concerning defects like the one in question, of the police of the city is not actual notice to the corporation; that such knowledge, if gained in pursuance of the officer’s duties and appointment, may be the means of knowledge, so as to charge the municipality with constructive notice.”

The Supreme Court of Colorado, in passing upon this, says:

“In our judgment both propositions are wrong. Whether a certain matter is in the line of a particular officer’s employment, is to be determined by construction of the statute or ordinance prescribing his duties; hence such determination is a question of law. Without discussion, but not without careful examination, we are prepared to hold that the ordinance before us sufficiently charges the chief of police with the care of coal holes and caps, as well as other obstructions, in or upon the sidewalks. Hence the court below should have instructed the jury that, if the officer had personal knowledge of the defective cap, the city should be charged with actual notice.”

From this it is evident that the ordinance of the city prescribing the duties of policemen was admitted in evidence, and that the Supreme Court considered that as proper evidence in the case. This, as we think, bears directly upon the question of the admissibility of the rules of the police department in evidence.

In the case of *Rehberg v. New York (Mayor)*, 91 N. Y., 137, it was held that notice to a policeman of an unlawful obstruction in the street was notice to the city.

In the case of *Goodfellow v. New York (Mayor)*, 100 N. Y., 15, where there was an obstruction upon a cross-walk and where

1904.]

Hamilton County.

there was an ordinance of the city requiring policemen on duty to inspect cross-walks, and the policemen had inspected, but testified that he observed nothing dangerous, and made no report, it was held that these facts were sufficient to charge the city with notice of the defect.

We, therefore, reach the conclusion that the court erred in excluding the rule of the police force offered in evidence; that it erred in excluding testimony as to what was said to and by the policeman who knew of the injury to Mrs. Pauli, and in directing the jury to return a verdict for the defendant, and for these errors the judgment of the court of common pleas is reversed and the case is remanded to that court for a new trial.

F. A. Beecher, Kerruish, Chapman & Kerruish, for plaintiff in error.

Newton D. Baker et al, for defendant in error.

CONVEYANCE OF LAND FOR BURIAL PURPOSES.

[Circuit Court of Hamilton County.]

THE METHODIST EPISCOPAL CHURCH OF CINCINNATI ET AL V.
JAMES N. GAMBLE.

Decided, February, 1904.

Deed—For a Valuable Consideration—Conveying Land in Trust for Burial Purposes—Is a Conveyance Absolute—Subsequent Diversion of the Property to Other Uses.

1. A deed to church trustees, conveying for a valuable consideration certain land "in trust for a place of burial, and for the use of the aforesaid church, and for any other purpose for the church aforesaid, and for none other," is not based on any condition precedent, and vests in the church a fee simple estate, with no right of revision of forfeiture to the grantor in any event.
- 2 The abandonment of the ground for burial purposes at a date long subsequent, and its conveyance to certain college trustees for college purposes, carried the right on the part of the college, to sell, mortgage or convey the premises in any manner for the best interests of the college, subject only to the duties imposed by the rights of owners of lots in that portion of the land devoted to the burial of the dead.

James N. Gamble brought his action in the Court of Common Pleas of Hamilton County against the plaintiffs in error to quiet his title to real estate in the city of Cincinnati. The plaintiff in error by answer and cross-petition, set forth matters of title claiming that the property had reverted to it, and praying that the defendant in error be decreed to hold said title as trustee for its benefit, to which answer and cross-petition James N. Gamble's demurrer was sustained and his title quieted.

The answer and cross-petition averred the following facts: A conveyance of said lands from Bernard and wife by warranty deed dated January 11, 1826, to certain trustees of the Methodist Episcopal Church of Cincinnati, in consideration of \$550 "in trust for a place of burial and for the use of the aforesaid * * * church and for any other purpose for the church aforesaid, and for none other"; the habendum clause provided, "To have and to hold * * * to the only proper use and behoof of the aforesaid * * * trustees in trust for the Methodist Episcopal Church of Cincinnati, and their successors in office, for a burial place for the use of the aforesaid church and for other purposes for the benefit of said church."

The act of the Legislature passed March 27, 1861 (O. L., Vol. 58, p. 159), reciting that by ordinance of the city of Cincinnati, burial upon said lands was prohibited and empowering the trustees of said church to sell said real estate, and in their discretion to apply the proceeds for the use of the Wesleyan Female College of Cincinnati; on condition that should said college ever cease to exist as an institution of said church, the whole invested property should revert to the said church trustees to be by them held according to the terms of the original trust. And by the second section of said act it imposed the duty upon the trustees of the church to properly remove the bodies buried therein and the tombstones to another suitable burial place.

The deed dated June 10, 1862, to said college conveyed in the words: "Do hereby grant, bargain and sell and convey to the said The Cincinnati Wesleyan Female College, its successors and assigns forever"; and specifying "This conveyance, however, is made subject to all encumbrances, if any, and to the duties

imposed upon the grantors herein by the second section of said act of the Legislature of Ohio passed March 27, 1861," and in the habendum clause, "To have and to hold the same to the only proper behoof of the said The Cincinnati Wesleyan Female College, its successors and assigns forever, subject to the duties and encumbrances aforesaid."

The answer and cross-petition further averred proceedings in the said court for the sale of portions of said lands, and investment of the proceeds in the erection and equipment of a building for said college; the giving of a mortgage by it upon the lands in controversy; the foreclosure and sale under said mortgage by decree in court; the reorganization of said college; the purchase of said property; its encumbrance by mortgage to raise funds to carry out said educational enterprise; the foreclosure of said second mortgage, and the purchase of the property by Mr. Gamble, in which foreclosure proceedings, however, the said Methodist Episcopal Church of Cincinnati was not a party.

SWING, J.; JELKE, J., and GIFFEN, J., concur.

James N. Gamble brought his action in the Court of Common Pleas of Hamilton County against the plaintiffs in error to quiet his title to certain real estate situate in the city of Cincinnati. The case was heard in said court and a decree was granted the plaintiff as prayed for. This action is prosecuted in this court to reverse this judgment.

We are of the opinion that the deed of January 11th, 1826, by Bernard and wife to Benjamin Mason and others, trustees of the Methodist Episcopal Church of Cincinnati, vested in said trustees a fee simple estate with no right of reversion or forfeiture to Bernard in any event. It was for a valuable consideration and not on any condition precedent, and while it says it is in trust for burial purposes, it also says "for any other purposes for the benefit of said church." The purposes for which it was to be used and sold was for the determination of said church by its proper authorities.

We do not see that the act of the Legislature passed March 27, 1861, added anything to or took away any right which had been granted in this deed, and it certainly did not attempt

to take away from the church the interest that had been granted to it by the deed of Bernard. This would have been beyond the power of the Legislature. What effect section two of said act may have had as to lot owners in that portion of the land devoted to the burial of the dead, does not arise in this case and need not be considered, as said lot owners are not asserting any rights here.

Whatever right the Methodist Episcopal Church of Cincinnati had in this real estate was conveyed by deed dated June 20th, 1862, to the Cincinnati Wesleyan Female College and its successors and assigns forever, subject to the incumbrances and the duties imposed by the second section of the act of 1862 in regard to lot owners, none of which are involved here. This right carried with it the power to sell, mortgage and convey these premises in any manner deemed best for its interests, and subject to the right of said church to see that the college was controlled by the church and in its interests. Said college borrowed money and having given a mortgage on the premises, such action was had in foreclosure proceedings that the interest of said college was sold to the Cincinnati Wesleyan College. This college also gave a mortgage and this mortgage was foreclosed and James N. Gamble became the purchaser.

We are unable to see any defect in his title; certainly whatever right defendants had passed from them long ago, and the judgment should be affirmed.

Wm. G. Roberts and David Davis, for plaintiff in error.

Walter L. Granger and M. L. Buchwalter, for defendant in error.

1904.]

Cuyahoga County.

THE CIVIL RIGHTS STATUTE APPLIED.

[Circuit Court of Cuyahoga County.]

LEWIS E. JOHNSON v. HUMPHREY POP CORN CO.

Decided, November 17, 1902.

Colored Man Denied Privilege Because He Was Colored—Of Bowling in a Pleasure Resort—Held to Have Been in Violation of the Statute—"Person" Includes Corporation.

1. A pleasure resort is a place of "public accommodation and amusement" within the meaning of Section 4426-1, and to deny one the privilege of bowling in such a resort for the reason that he is a colored man of African descent is in violation of the statute.
2. The word "person" as used in this statute includes corporation.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

The parties here are as they were in the court of common pleas.

The plaintiff filed a petition against the defendant, setting up that the defendant is a corporation, and was, on July 17, 1901, and for many weeks prior thereto, the proprietor of and operated as such proprietor a pleasure resort, a place of public accommodation and amusement called "Euclid Beach Park"; that on the date last named the plaintiff was a patron of said pleasure resort; that he was lawfully upon the grounds of the defendant by permission and invitation of the defendant; that he duly procured a ticket for the privilege of bowling in a certain bowling alley maintained and operated by the defendant as a part of the amusements of said resort and for the benefit of its patrons; that he presented himself at said bowling alley and requested the privilege of playing therein in common with other persons, his friends; that the defendant denied him the privilege of so playing wrongfully and without legal excuse; that by reason of this action of the defendant he was greatly disappointed, mortified and humiliated, and that he has been damaged as a result thereof in the sum of \$275, for which he prays judgment. He says further in his petition that he is a colored man, a person of African descent, and that he was so denied the

privilege of bowling for no other reason that that he was a colored man, a man of African descent.

To this petition the defendant filed a general demurrer, which was sustained, and judgment of dismissal of the petition rendered against the plaintiff, and this is assigned as error.

Our attention is called by the plaintiff to Sections 4426-1 and 4426-2, Revised Statutes, with the preamble to these sections. The preamble reads:

“Whereas, it is essential to just government that we recognize and protect all men as equal before the law, and that a democratic form of government should mete out equal and exact justice to all, of whatever nativity, race, color, persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law, therefore:

“Section 4426-1. That all persons within the jurisdiction of said state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, eating houses, barber shops, public conveyances on land or water, theaters and all other places of public accommodation and amusement, subject only to the conditions and limitations established by law, and applicable alike to all citizens.

“Section 4426-2. That any person who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial shall, for every such offense, forfeit and pay a sum not less than fifty (\$50) dollars nor more than five hundred (\$500) dollars to the person aggrieved thereby, to be recovered in any court of competent jurisdiction in the county where said offense was committed; and shall also, for every such offense, be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty (\$50) dollars nor more than five hundred (\$500) dollars, or shall be imprisoned not less than thirty (30) days nor more than ninety (90) days, or both; and provided further that a judgment in favor of the party aggrieved, or punishment upon an indictment, shall be a bar to either prosecution respectively.”

It will be noticed that the Legislature declares the purpose of these statutes by the preamble to be, to enact a great fundamental principle into law, and that principle, as stated, is “that

1904.]

Cuyahoga County.

a democratic form of government should mete out equal and exact justice to all, of whatever nativity, race, color, persuasion, religious or political."

It will be noticed, further, that in the first of these two sections the rights of citizens in respect to the public places named in the section are declared. These rights are that each citizen shall be entitled to the full and equal enjoyment of the "accommodations, advantages, facilities and privileges" of the several places named in the section. Among these are "theaters and all other places of public accommodation and amusement."

From the allegations of this petition it can not be doubted that the defendant's place of business was a place of "public accommodation and amusement," and that, therefore, the plaintiff was entitled, exactly as all other citizens, to the enjoyment of all the accommodations of such place, and that this section was violated by the defendant in refusing him, for the reason set out in the petition, the right to bowl at the bowling alley. This being so, a wrong was perpetrated upon the plaintiff. Whether this wrong was such as would entitle the plaintiff to a recovery in the absence of the succeeding section it is not necessary here to determine, because the next section provides that the party injured may recover, as well as that the party perpetrating the wrong may be prosecuted criminally.

It is urged on the part of the defendant that the language of the last section referred to, "that any *person* who shall violate any of the provisions of the foregoing section," etc., does not include a corporation; that the word "person" must be held to be restricted to a natural person. It is true that the word "person" sometimes in the statute must be construed to mean natural persons only, and that sometimes it must be construed to include artificial persons.

Black, in his work on Interpretation of Laws, at page 138, says:

"The word 'person' is a general or generic term. Hence, when used in a statute, it embraces not only natural persons, but also artificial persons, such as private corporations, unless the context indicates that it was used in a more limited sense, or the subject matter of the act leads to a different conclusion.

That is to say, it applies to corporations in all circumstances where it can reasonably and logically so apply."

Surely if these statutes are to accomplish the purposes declared in the preamble and named in the first of the two sections, the word "person" must be held to include artificial persons, that is, private corporations; otherwise, of what possible use would it be to provide that all persons shall have the privileges spoken of in the statute, among which are enumerated "inns, * * * public conveyances on land or water, theaters," etc. So far as public conveyances are concerned, the statute would be perfectly worthless. These conveyances on land are almost exclusively either railroad cars, operated by steam or electricity, and owned by corporations. On the water, they are mostly vessels owned by corporations. Theaters are almost universally conducted by corporations. The same is true of hotels, and, to a considerable extent, is true of each of the places enumerated in the statute. If the contention claimed on the part of the defendant in error is to be sustained, the result is that one may be denied the privileges mentioned in the first of these two sections by street car companies, by railroad companies, steamboat companies, by hotel corporations, and be absolutely without remedy; and, so far as these several things are concerned, the statute might as well never have been passed. It was without doubt the intention of the Legislature to enact into positive law what has come to be recognized as justice, that the colored man shall not be refused equal privileges with other people in these public places, and to permit them to be denied by corporations would be, in effect, granting to a creature of the state power to treat as a nullity an enactment of the Legislature of the state.

A man is at liberty to select for his associates whom he will, provided only that the party whom he selects is willing to be his associate. He is at liberty to invite to his home whom he will, and to exclude from his home whom he will, but this does not give to one citizen above another, under the same circumstances, the right to say who shall be admitted to the privileges of the public places enumerated in this section of the statute first referred to.

1904.]

Cuyahoga County.

Apply the rule for the interpretation of the word "person" given in *Black*, and one can not well conceive a case where, in the nature of things, it should be held to include private corporations if it is not so to be held in the interpretation of this statute.

The case of *Hargo v. Meyers*, 4 C. C., 275, cited by counsel for the defendant in error, is not in point in this case. The holding in that case is that an action under the statutes under consideration will not lie against a partnership in its firm name alone to recover a penalty for the violation of the act. In the opinion in that case, however, attention is called to the case of *State v. Fertilizer Co.*, 24 Ohio St., 611, 614. In that case it was held that the word "person," as used in a criminal statute for the punishment of those who maintain nuisances, did not include a corporation. In that case Judge Welch, in his opinion, said:

"Criminal laws are to be construed strictly in favor of the accused. In its primary sense, the word 'person' means a natural person only. I know of no criminal statute in Ohio where the word has been held to apply to a corporation; * * * the whole theory and machinery of our administration of criminal law seem adapted only to the prosecution and punishment of natural persons. There is no provision of law for bringing an indicted party into court by summons, or otherwise than by actual arrest of his person. Under such a state of legislation and practice, the Legislature could not have intended, in the use of the word 'person,' which is found in almost every criminal law of the state, to authorize an indictment against a corporation for this particular offense, without any special or further provision as to the liability of corporations, or the mode of proceeding against them."

Prior to this decision there was a statute in force in Ohio providing for the prosecution of incorporated companies for maintaining a nuisance (see 63 O. L., 97), but there was nothing then, and, so far as we know, there is nothing now in the criminal statutes of the state declaring that the word "person" shall be held to include a private corporation. But it must be borne in mind that no effect is made in this case to prosecute the defendant as for a crime. It is true, the statute is penal in its nature, but it

was passed for the purpose, as has already been said, of compelling those owning or conducting these places of public resort to make no discrimination against one because he is of African descent, and the only way to make that effectual, in the great majority of cases, is to hold that the word "person," as used in the statute, includes corporations.

The case of *Ferguson v. Gies*, 46 N. W. Rep., 718 (82 Mich., 358), was decided by the Supreme Court of Michigan in 1890. The case arose under a statute similar to ours, except that no provision is made in the Michigan statute for the recovery of damages in a civil action by one who has been deprived of the privileges provided by the statute. A punishment is provided for a violation of the statute, and it is declared that one so violating is guilty of a misdemeanor.

In that case it was held that the defendant, who denied a colored person the privilege of eating at a table in a public restaurant in the city of Detroit, where other patrons of the restaurant were permitted to eat, the denial being because the plaintiff was of African descent, is civilly liable. The opinion seems to be well considered and supported both by reason and authority, and is instructive in this case.

The judgment of the court of common pleas is reversed and the case remanded for further proceedings.

A. H. Martin, for plaintiff in error.

Smith & Taft, for defendant in error.

1904.]

Hamilton County.

APPEAL BY A GUARDIAN AD LITEM.

[Circuit Court of Hamilton County.]

J. C. HARPER, TRUSTEE, v. R. L. CILLEY ET AL.

Decided, March 5, 1904.

Guardian Ad Litem—May Take an Appeal as the Representative of His Ward—Liable Individually on the Appeal Bond.

1. A guardian *ad litem*, though having no personal interest in the suit, is entitled to take an appeal as the representative of the infant, who is a party to the suit, but without legal capacity to make a defense.
2. While the guardian *ad litem* may be without authority to bind the estate of his ward by the giving of an undertaking in appeal, he is nevertheless liable individually on the bond.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

This case was appealed to this court by the guardian *ad litem* of an infant, and the motion is made to dismiss the appeal for the reason that the guardian was not such a party to the suit as entitled him to take an appeal. Section 5003 of the Ohio Statutes provides that:

“The defense of an infant must be by a guardian for the suit, and may be appointed by the court in which the action is prosecuted or by a judge thereof, or by a probate judge.”

In the case of *Long et al v. Mulford et al*, 17 O. S., 485, the first proposition of the syllabus is as follows:

“It is the duty of a guardian *ad litem* to make for the infant a proper defense, and for this purpose to bring the rights of his ward under the consideration of the court for decision.”

And at page 503, it is said that:

“The appointment of a guardian *ad litem* is not a mere matter of form. A suit against an infant can not be prosecuted without such guardian; and the object of the requirement is to secure to the infant a proper defense.”

The case in this court is the same as that in which the guardian was appointed, and the question whether the defense should be made for the infant can not be determined by her, but must

be determined by the guardian, and if, upon full consideration he deems it advisable to appeal the case to this court, it his duty to do so.

The question has never been decided by our Supreme Court, but in other states under similar statutes it has been held that the guardian *ad litem* has the right to take an appeal from the judgment adverse to his ward. The case of *Thomas v. Levering*, 73 Md., page 451, the fourth proposition of the syllabus is as follows:

“In contemplation of Section 24 of Article V of the Code, regulating appeals from courts of equity, a guardian *ad litem* may be a party to the suit, and as such has the right of appeal on behalf of the infants, for the purpose of protecting or advancing their interests.”

In the case of *Tyson v. Tyson et al*, 68 Northwestern, 1015, the Supreme Court of Wisconsin held that:

“A guardian *ad litem*, appointed for an infant defendant by the court in which the action is prosecuted, pursuant to Revised Statutes, Section 2613, may appeal from a judgment against the minor, without permission of court.”

It is claimed by counsel for the defendants that the guardian *ad litem* is not a party to the suit, and none but the party is entitled to take an appeal under Section 5226, Revised Statutes. While it is true that the guardian has no personal interest in the suit, yet he takes the place of and represents the infant, who, though a party to the suit, has not the legal capacity to make a defense.

The further claim is that the guardian *ad litem* who gave an undertaking for the appeal, is without authority to bind the estate of the infant, but assuming this to be true, he would nevertheless be liable individually upon the bond.

The motion will therefore, be overruled.

Harper & Allen, for plaintiff.

Bromwell & Bruce, contra.

1904.]

Lucas County.

TITLE TO VACATED PORTION OF STREET.

[Circuit Court of Lucas County.]

LUELLA PRICE ET AL V. THE CITY OF TOLEDO ET AL.

Decided, October 31, 1903.

Street—Title to Portion Vacated Reverts to Present Adjoining Owners—Assessment for Street Improvement—Injunction Against Collection of, Because in Excess of Special Benefits—What Must Be Shown—Province of the Court in Reviewing Assessment—Improvement Begun Under a Statute Held Constitutional—And afterward Held Unconstitutional—Validity of Assessment Not Affected Thereby.

1. Where a portion of a street, consisting of a narrow strip off one side of such street is vacated by a municipality and no longer used as a part of the street, the title to such strip goes to the owners of the lots adjoining it and theretofore abutting upon the street and does not revert to the original owners, and such lots after such vacation are still subject and liable to an assessment as abutting property for improving such street and it is immaterial that said strip was a part originally of lots other than those so held liable to assessment.
2. Where an assessment, according to benefits for a street improvement has been in all respects duly and regularly made and all the proceedings are complete, and no complaint is made by property owners until an action is commenced to enjoin the collection of such assessment on the ground that it exceeds the benefits the court will not grant such relief, unless the action of the council or other municipal authorities has been fraudulent or tantamount to fraud or the assessment is so excessive as to clearly and unquestionably exceed the special benefits to said property.
3. In such cases the court does not sit as a court of appeal to review the action of the municipal authorities and make a new assessment, upon the evidence, according to its judgment.
4. Statutes having been held constitutional by the Supreme Court, proceedings under them are not affected by subsequent decisions of the court overruling the former decisions, and holding such statutes unconstitutional; but they are to be regarded as constitutional, so far as such proceedings are concerned, and assessments made under them prior to the later decisions are valid.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This action was brought by Luella Price and twenty others to enjoin the city of Toledo and its officials from levying and col-

lecting a certain assessment made for a pavement laid on Junction avenue in the city of Toledo. The assessment was made on the rule of benefits, not by the foot front. It is claimed that there were some irregularities in the proceedings, but it is complained chiefly that the assessment was in excess of the benefits and that, therefore, its collection should be enjoined. It is claimed that the benefits were very much below the amount of the assessments. The street, Junction avenue, is in the westerly part of the city and runs through what is spoken of as the "Polish Settlement," most of the people living in that vicinity being Polanders and owning small lots, worth from \$200 up to \$300 or \$400, and, in some cases, a little beyond that, without the buildings, and it is urged that this assessment is very oppressive. It is claimed that notices were not given to some of the plaintiffs, as required by Section 2204, Rev. Stat., of the resolution passed by the city council declaring the necessity of this improvement. Mr. Taylor claims that there was no notice given to him. We find, however, that he was at the time living in a hotel, which was his home, and the notice was given to the clerk of the hotel, pursuant to his directions, he having directed the clerk to bring such notices to his room, and, after a time, directed that the notices should be left at the office of the Detwiler Company, or taken to that office. The officer whose duty it was to leave the notices testifies to leaving them with the hotel clerk and we are of the opinion that the notice was given in accordance with the statute. There were objections by some of the other plaintiffs that they were not served with notice, but their testimony is indefinite; some say they can not remember whether they received notice or not, but in the case of each one Mr. Voight testifies positively that he either served him personally or left the notices at his place of residence, or where he had been directed to leave them, and we find and hold that notices were served upon all of these parties as required by law, and, therefore, that the city had jurisdiction to proceed. Under a recent decision, 67 O. S., page 264 (*Joyce v. Barron, Treasurer*), it was held by the Supreme Court that failure to give this notice is fatal; that no assessment can be made without it; that it does not simply leave

1904.]

Lucas County.

open the claim of the party for damages, but that the notice is a prerequisite to the city obtaining jurisdiction over the party and his property. We hold in this case, however, that notice was in fact given.

Another objection to this assessment, as to five of the lots, is, that they do not abut upon the street improved. They did at one time abut upon the street, the property being appropriated for the street by the city, but, some time afterwards, a portion—a narrow, wedge-shaped strip along the side of the street—was vacated so as to straighten the lines of the street, this strip being eight or ten feet wide at one end and running down to a point at the other end, and lying in front of five of these lots, and it is urged that they can not be assessed because they do not now abut upon this street. We hold, however, that this can not be maintained. This strip of land was vacated by the city and no longer held for street purposes. It belonged at the time it was taken by the city to lots other than those in question in this case and lying in front of them; but, upon the vacation of this strip the title reverted, not to the original owners, but to the owners of the lots that did abut and bound upon the street before the vacation. It has been held in several cases that the title in such case reverts to the owners of the lots that did abut immediately upon the street before such strip was vacated. This question is discussed very fully in a well considered opinion by Judge Shearer in the Sixth Circuit Court Reports, 142 (*Stevens v. Shannon*). The first paragraph of the syllabus is:

“The vacation of the streets and alleys of a duly established addition to a municipal corporation extinguishes the interest of the public therein; and the title to such streets and alleys vests in the owners of the abutting lots.”

This case was approved by the Supreme Court in *Kerr v. Commissioners* and in *Stevens et al v. Taylor, Excr., et al*, 51 O. S., 593; 64 O. S., 264, is also in point on this question. There is no question but that the title to this property is in these lot owners, and the effect of it is that this adds to their lots—they have that much more property—and it brings them to the street; it is immaterial that this strip still goes under the numbers of

the lots that it formerly belonged to, the truth and fact is that it has become a part of the lots of these owners adjoining it, and in the improvement of the street these lots are to be regarded as bounding and abutting upon the street. They do in fact abut upon the street and have all the advantages and benefits of it and there would be neither justice nor equity in holding that they can not be assessed for the improvement of the street, and we hold that they may be.

We come now to the question whether this assessment was so excessive that the court can interfere in behalf of these plaintiffs. It is claimed that it is largely in excess of benefits. This assessment was made under Sections 2271 and 2272 of the Revised Statutes, which are special acts applying only to the city of Toledo, allowing an assessment of twenty-five per cent. upon the value of the property after the improvement, but subject to the general rule that the assessment shall not exceed the benefit. There is a provision in Section 2272, however, that if three-fourths of the owners of the property upon a street petition for an improvement the owner signing the petition may be assessed in any amount—to the full value of his property, or even twice its value, but probably the courts would hold that it could not be assessed for more than the value of a man's property, for that would perhaps be confiscation. But in this case it is claimed by the city that the assessment did not exceed twenty-five per cent. of the value of the property after the improvement was made; and, further, that the assessment does not exceed the benefits. That was a question of fact contested on the trial before us and witnesses were called.

There are several decisions in this state on this question and the powers of a municipality in these matters and the power of the courts and the limitations upon municipal power in making assessments. The fundamental principle as stated by many of the decisions, is that the right to assess rests upon the basis of benefits to the property assessed; that the right is given to a municipality by reason of the fact that the property is specially benefited by the improvement; this is the "fundamental principle." If it were not for that—if it were not thus benefited—it would be taking property without due

process of law and making a man pay for an improvement by the municipality, which was of no special benefit to him, which would be the taking of property for public uses without compensation, and all these statutes and cases recognize this general principle.

As to just what the powers of the courts are in these matters, no definite rule has been laid down, perhaps, but the general question has been discussed in several cases. There are three of them in the 61st O. S. Reports. One is found on page 15 (*Walsh v. Barron*), where the Supreme Court say:

“The fundamental principle underlying an assessment made on property for the cost and expense of a local public improvement is, that the property is specially benefited by the improvement beyond the benefits common to the public and that a ratable assessment of the property to the extent of these benefits violates no constitutional right of the owner, and is just and proper. But it can in no case exceed the benefits without impairing the inviolability of private property.”

On page 27 of this volume (*Birdseye v. Clyde*), is a case in which it is said, in the first paragraph of the syllabus:

“It is the general policy of our legislation to restrain the power of local assessment by fixing a limit on the amount that may be levied beyond which municipal corporations may not go; and unless the contrary clearly appears, an intention to adhere to that policy in the enactment of particular statutes relating to local assessments will be presumed, and a construction given to them allowing the application of the general limitations.”

In the first case in the book (61 O. S., p. 1), the court say, in the syllabus:

“Where, in a suit brought to enjoin the collection of a street assessment as invalid, and the taking of property without due process of law, it appears that the ordinance levying the assessment provided that the cost and expense of the improvement should be assessed upon the abutting property by the foot front, and not otherwise, but it also appears that an issue was made by the pleadings on the question whether or not the land so assessed was in fact benefited by the improvement to an amount in excess of the cost so assessed, which issue is found by the trial court against the plaintiff, and it is neither shown nor claimed that the cost and expense was not apportioned fairly

between the property of plaintiff affected by the assessment, and that of others so affected, the collection of such assessment should not be enjoined simply because the proceedings of the council in enacting the ordinance and levying the assessment do not show affirmatively that the question of benefit to the land was taken into consideration in levying such assessment."

All these cases recognize the principle that there is a limitation somewhere upon assessments—either an arbitrary limitation or a certain per cent. of the value, or that the assessment shall in no case exceed the benefits. In the statutes of the state applying to municipalities generally, for many years the limitation has been twenty-five per cent. of the taxable value of the property—the value at which it is listed for taxation. In the first statute passed in this state on this subject—the original municipality act—the limitation was fifty per cent. of the value of the property after the improvement. That was found to be too high and the statute was amended and the amount reduced to twenty-five per cent. of its taxable value. These two statutes applying to Toledo, as stated, limit the assessment to twenty-five per cent. of the value of the property after the improvement. These statutes are clearly unconstitutional, on the ground that they are special legislation and violate Section 26, Article II of the Constitution of the state. Whether that can be taken advantage of by the plaintiffs in this case will be discussed further along.

We find that the proceedings in this case were regular. The notice was given to the property owners of the passage of a resolution declaring the necessity for this improvement; and after the assessment was made, the plat and other proper papers were filed with the clerk, as provided by statute, and notice was published for three weeks, as the law requires, for any who wished to make complaint of the assessment, and a committee of three freeholders was appointed, as the law requires, to sit as a board of equalization, all of which is provided for in Sections 2278 and 2279.

Section 2279 provides:

"If any person objects to the assessment, he shall file his objections, in writing, with the clerk, within two weeks after

1904.]

Lucas County.

the expiration of the notice; and thereupon the council shall appoint three disinterested freeholders of the corporation to act as an equalizing board."

No one of these plaintiffs took advantage of these provisions of the law enabling him to make complaint of the assessment if he so desired. They complained for the first time in this action, in which they ask for an injunction. The plaintiffs in the case called one witness who may be considered as an expert upon real estate values and the question of benefits, and he went over this property in his testimony, lot by lot. The defendant called two, who may be regarded as experts to some extent, having had considerable experience in matters of this kind. According to the testimony offered by the plaintiffs, the assessment on most, and perhaps all of the lots, exceeds the benefits to some extent. It goes beyond the benefit to this property according to the opinion of the expert called by the plaintiffs and according to the opinion of some of the lot owners. According to the testimony of the witnesses called by the city—two experts and one other, not so much of an expert—the benefits accruing to this property equal the assessment. These are the opinions of those witnesses. When we get into the matter of the benefits of an improvement, it is a matter of judgment or opinion—it is not a question of fact that can be positively determined. The judgment of one man differs from another.

We are of the opinion that we have no right as a court to interfere with an assessment and enjoin its collection on the ground that the benefits are not equal to the assessment unless the assessment is fraudulent or there is such a disparity as to be clearly wrong and unjust and tantamount to fraud on the part of the authorities. Where the assessment is so clearly and unquestionably excessive that there can be no material difference of opinion upon the question, we think that the court may grant relief. But where there is a mere conflict of evidence and where all the proceedings have been regular, where the notices have been given, where the proper officers have acted upon the matter and all legal steps taken and the party complains for the first time in a court of equity, in such a case, we

are of the opinion that the court ought not to interfere. To hold that the court should do so would be to require a re-examination and review by the courts in almost every assessment in this city and in every city in the state. There is hardly an assessment made for a street improvement, for a sewer or for any other public improvement, where there are not some who are of the opinion that they are assessed too heavily—that the assessment is too high. But we do not sit as a court of appeal from the action of the council or the board of equalization, to hear the case anew and review it upon the evidence and then according to our opinion determine what would be a fair assessment. All these matters have been committed to the council and the duly authorized boards to determine, and they have as much authority within their jurisdiction as the courts themselves.

The general rule, we think, is laid down in the 34 O. S., p. 551 (*Chamberlin v. Cleveland*). The court say, in the 9th paragraph of the syllabus:

“Where the city council determines that the amount of the assessment does not exceed the value of the benefits specially conferred, its judgment in the premises, in the absence of fraud, is final and conclusive, unless modified by the council before final determination, as provided in Section 588; but when the municipal authorities, in levying special assessments do not undertake to determine the amount of the special benefits conferred, either in respect to the amount assessed, or in the apportionment of the burden, the assessment may be enjoined; and in an action for that purpose parol evidence may be introduced to show that the authorities did not act on the proper basis.”

We are unable to find from the evidence that the action of the council in this assessment was fraudulent, or the assessment so unjust and excessive as to be tantamount to fraud. The weight of the evidence, if we determined it by the number of witnesses, is perhaps on the side of the city. The assessment, it is true, seems high. These lots are not valuable—a forty-foot lot in that neighborhood being valued at about \$400, on the average—and the owners of most of them, as is shown by the evidence, are poor people, and to put an assessment on such a lot—worth \$400—of \$180 or \$200, seems high and burdensome to people in that condition, and they feel that these lots were

1904.]

Lucas County.

of as much value before this assessment as they are now. But it is clear from the evidence and from common knowledge that such an improvement as this does add to the value of the property. The evidence shows that this territory was very low and marshy and the street covered by water—portions of it—a large part of the year, and almost impassable at times, and the paving of the street has very much improved it and added very much to the value of these lots, and while before it was almost impossible to sell a lot, as some of the witnesses testify, they can now be sold for a fair price. We are unable to find that the assessment is excessive, or that it goes beyond the limit in this special statute—twenty-five per cent. of the value after the improvement.

It is urged, however, that these two statutes applying only to the city of Toledo, are unconstitutional, and that as the assessment was made under them, it should be enjoined and the city sent back to a constitutional statute passed many years ago by which the limit is fixed at twenty-five per cent. on the taxable value of the property. These two Toledo statutes are clearly unconstitutional under the recent decisions of the Supreme Court. They are in violation of Section 26, Article II of the Constitution and would not sustain an assessment made at this time. An assessment made under these statutes now, would be held by the courts to be invalid. But at the time this assessment was made and these proceedings were had, these statutes, or similar statutes, had not been declared unconstitutional by the Supreme Court, but for more than forty years the Supreme Court had held such statutes valid and constitutional, in decision after decision reported in the volumes of the Supreme Court Reports, and when these assessments were made by the city and this improvement determined upon the city stood upon the law as it then was found in the statutes and in the decisions of the Supreme Court, and the city had a right to do so. The decisions of the Supreme Court which had been made up to that time were a part of the law of the land just as much as the statutes themselves and when the Supreme Court declared a statute unconstitutional, that made it so for all purposes of property, contracts and vested rights and it remained constitutional

and valid until the Supreme Court held that such statutes were unconstitutional. The rule upon this question is stated by the Supreme Court of this state in 61 O. S., 471 (*Lewis v. Symmes*). I read from page 486, which is a quotation from an opinion delivered by Chief Justice Waite in *Douglas v. County of Pike*, 101 U. S., 677:

“The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, making it prospective but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.”

Our Supreme Court say, through Judge Shauck, delivering the opinion:

“This compendious statement of the rule and its reasons meets the requirements of all the cases cited. Its purpose is to secure the full operation of the constitutional prohibition of laws impairing the obligation of contracts.”

This question has been discussed in a very recent decision of the Supreme Court, 68 O. S., 603, *Shoemaker v. Cincinnati*, decided June 23, 1903. The court say, in the first paragraph of the syllabus:

“An owner of land which has been assessed for the improvement of a street is not entitled to an injunction restraining the collection of such assessment where a statute in all material respects the same as the one under which the improvement was made and the assessment levied, and the bonds of the municipality to pay the cost issued, had theretofore been adjudged valid by the highest court of the state, simply because similar legislation was held in the same court long afterwards to be in violation of the Constitution.”

Judge Spear in delivering the opinion, says:

“So that the inquiry comes finally to this: Is the owner of property which has been assessed for the improvement of a street entitled to an injunction restraining the collection of such

1904.]

Lucas County.

assessment where a statute in all material respects the same as the statute under which the improvement was made and the assessment levied and the bonds of the municipality to pay the costs issued, had been theretofore adjudged valid by the highest court of the state simply because similar legislation was held by the same court long afterwards to be in violation of the Constitution? We answer the question unhesitatingly in the negative.

"It is a principle of universal application that a cause of action once finally determined between parties by a competent tribunal can not afterward be litigated between the parties or their privies by a new proceeding. It is the principle of *res judicata*. It rests not only on the private rights of the parties but it is a principle of public policy having been characterized as a 'fundamental consent of the organization of civil society.' It is equally well settled as a general proposition, admitting, however, of exceptions, that courts will adhere to and follow decisions of the highest court of the jurisdiction where the same points come again in litigation; and the rule is of universal application where the law has become settled as a rule of property, by reason of such earlier decisions, and rights have become vested on the faith of them. This is the doctrine of *stare decisis*. The broad principle lying at the base of both of these rules is embraced in the translation of the term *res judicata*, viz.: 'That the matter has been decided.'"

We hold that while these statutes are to-day unconstitutional under the recent decisions of the Supreme Court, that at the time these proceedings were had and this assessment was made, such statutes had been held to be constitutional and in this case they are to be considered as valid and constitutional enactments. As Judge Spear says further along in the opinion, it would be unjust to throw a large part of this assessment upon the city because such statutes at this late day have been held unconstitutional by the Supreme Court. The making of an improvement of this kind is in some respects in the nature of a contract between the city and the lot owners. The property owners have their obligations to perform in reference to the contract and their rights, and the city has its rights and duties. The transaction is mutual. The parties entered into it and contracted in the light of the law as it then was and their rights and duties are based upon the statutes and decisions as they then existed,

and they can not have relief now on the ground that these statutes have, since this assessment was made, been declared unconstitutional by the Supreme Court. Under the new municipal code the limitation for such assessments is fixed absolutely at thirty-three and one-third per cent. of the taxable value of the property, beyond which an assessment can not go, and it is certain that assessment statutes should always have some limitation in them so that when property owners ask to have an improvement of this kind made they will know what the limit is.

We are of the opinion that the prayer of the petition for an injunction should be denied, for the reasons stated, and the petition dismissed, and this will be the decree.

C. B. Hadden, for plaintiffs.

W. G. Denman, City Solicitor, and Charles K. Friedman, Assistant City Solicitor, for defendants.

INSURANCE OF RAILROAD FREIGHT BRAKEMAN.

[Circuit Court of Lorain County.]

BELL H. SNOW v. MODERN WOODMEN OF AMERICA.

Decided, October 12, 1902.

Insurance—Occupation of "Railroad Freight Brakeman" Excluded—Holder of Policy Killed While Employed as a District Yard Brakeman—Meaning of the Excluded Occupation Determined from the Hazard—Motion by Both Parties to Direct Verdict—Gives the Case to the Court for Determination.

1. Where it is provided in a policy of life insurance that the policy shall be void should the insured be killed while employed as a "railroad freight brakeman," this provision is not rendered inoperative by reason of the fact that his employment was what was known as a "district yard brakeman," if it appears that the hazard connected with the employment remains substantially the same.
2. Error does not lie to the determination of a case by the court, where at the conclusion of the evidence each party moved that the jury be instructed to return a verdict in his favor.

CALDWELL, J. (orally); HALE, J., and MARVIN, J., concur.

The son of Bell H. Archer Snow, on October 16, 1899, was engaged upon the electric railway, and he then made application

1904.]

Lorain County.

for membership in the Modern Woodmen of America, which is a mutual benefit society.

He entered service upon a steam railroad and lost his life. Bell Snow brings this action to recover on the policy in which she was the beneficiary. The action was tried below and a judgment rendered for the defendant, and a petition in error is prosecuted in this court to reverse that judgment.

The question in this case is wholly one of fact. When the action was commenced and the answer first filed and also an amended answer, it was claimed on behalf of the plaintiff below, Bell Snow, that the deceased was engaged in the work on the railroad as a railroad freight brakeman; but after the amended answer was filed and a reply filed to the amended answer, it was then claimed that he was what is known as a district yard brakeman, and that he was not a railroad freight brakeman. And the contention in the case in the evidence is, whether there is such a thing as a district yard brakeman, and whether there is such a thing as a railroad switchman; whether he acted in the capacity of a district yard brakeman or a railroad freight brakeman and whether he was acting as a switchman also. And the way that contention arose was this: There was a provision in the application or policy, that if he was killed while acting in the capacity of a railroad freight brakeman or railroad switchman his policy should become void, and if he was acting in that capacity then this policy is void; if he was not, but acted in some other capacity, then if he is killed the insurance would be good, even if he did act in that capacity, and the plaintiff ought to recover.

It is not necessary to discuss this evidence, but there is considerable evidence to show that among the men there is what is known as a district yard brakeman, and that his duties or the place in which he works at least is different from that of a railroad freight brakeman, but we think the evidence shows that his duties are largely the same; notwithstanding he is called by the witnesses a district yard brakeman, yet he is really a railroad freight brakeman; he was a brakeman on freight cars exclusively, except as they might in the yards want to switch out passenger cars. He traveled from one point to another, but

did not run over the whole line as a rule, and yet I notice these witnesses are wonderfully puzzled when the question was asked them, "Suppose he should go to Massillon or at times to Ulrichsville? The district in which he was working and in which he generally worked was that of Elyria and Grafton.

"Now what if he went to Massillon, what would he be?" I notice the witnesses were puzzled and confused to know whether he was then a railroad freight brakeman or still a district yard brakeman. Now under this evidence, it is necessary to see what the parties were trying to get at when this contract was made. The parties had in their minds no such fine distinction as is drawn by some of these witnesses. The company was saying, we will not insure you if you are engaged in a certain line of work, because of its danger, it makes the hazard too great, we will not undertake it, and hence they said to the party, if you are engaged as a railroad freight brakeman or railroad switchman we will not insure you, and after you are insured if you become engaged in those avocations, then your policy shall be void. Now he assented to that. What did they understand, what were they trying to get at? They were trying to get at this, a man who brakes on a freight train and is engaged in constantly coupling and in handling these freight cars, is in a business that is exceedingly hazardous; he is on the ground, jumping on to engines, running from one car to another; he is stopping cars when they are kicked and when they are switched and under all circumstances. They say this is such a hazardous thing we will not take the risk on your life, or if you are a switchman in the same way you are jumping on to locomotives, you are jumping off, riding on the cow-catchers, you are riding everywhere, and that is so hazardous we will not accept you as a risk; if you become such we will not take you.

That is what the parties were getting at, and the only way to avoid this testimony and the intent of the parties is by reason of applying to him a technical name, that of district yard brakeman. Yet he is still performing the same things, doing the same things, in substance, the same hazardous work that he would if he was a freight brakeman. That is what the parties had under consideration when they made this contract, and we think

1904.]

Lorain County.

this evidence shows that this work was quite hazardous, that he was a railroad freight brakeman, and he was not doing anything else but acting as a freight brakeman, although he had a limited territory, that is the only difference. I mean by that, it is the only difference that ought to bear on this contract. Of course there is a difference in pay, and other little differences that do not bear upon the intention of the parties in making the contract at all.

The case was decided in favor of the insurance company, and we think justly so under this testimony.

Now it is contended there was error in the introduction of testimony. This question was asked:

“What is meant by a railway freight brakeman?” Answer. “A man who runs on a through train, a way train; a man who may brake on a through train or way train.”

That was objected to and an exception saved to the ruling of the court in overruling the objection. Then the testimony goes right on to ascertain from the witness the duties of a railway freight brakeman, instead of stating what the difference is, or what constitutes one or what constitutes another, he now goes on to tell the duties of each, which is the better way, so that the whole testimony which was sought in that case was determined, and that was not error.

This question was asked:

“And is there any difference in the pay that they receive?”

And that was objected to and sustained. It clearly appears from the testimony, and is not disputed on the other side, that there is a difference in the pay, so it could not possibly have been prejudicial, because we do not see it determined any question under this contract that is material to it. It was not to be void if he received less pay than somebody else, some other class of men; but it was to be void if he did a certain kind of work, if he was engaged in a certain kind of work, and hence, the pay hasn't anything scarcely to do with it.

Then there was a conversation between him and another party, and that party was called, after this insurance was perfected; there was a conversation as to what he said about the validity

of his policy by the fact he was engaged upon the railroad, and doing the kind of work he was.

The court, after that testimony was partly introduced, made a ruling that it was not competent at all to defeat the plaintiff's right under that contract, she being the one to whom the money was to be paid; that he could not make any admission nor by any conduct of his, anything he might say, defeat her right to a recovery, and that seems to be the holding of the court, so the court ruled that testimony was not admissible for any such purpose as that, but only as showing what he was engaged in doing at that time, and that testimony was all received under that ruling, although different questions were asked thereafter and exceptions taken, yet that ruling of the court was made, and we do not see why it may not be used to show what work he was engaged in at the time of this conversation.

It was not necessary to show the kind of work he was then doing, and the purpose of the party might have been for something else; but the court was ruling it might be admitted for one purpose, it was proper only for that purpose, although perhaps the purpose of the party introducing it was to get before the jury the fact he thought his policy was not good for anything if he was killed in the service, by reason of the occupation he was following. But that the parties could have easily taken care of by having the court charge the jury specially they should not consider the evidence for such purpose.

Then this objection is made, when the evidence was all in, the plaintiff asked the court to direct the jury to bring in a verdict in her favor. Immediately the defendant, with apparent pleasure so far as we can see, asked the court to direct a verdict in favor of the company, and the court thereupon took the case and disposed of it. The case, *First National Bank v. Hayes*, 64 Ohio St., 100, we think, is decisive of this question, that such was the duty of the court, and it was not error in the court to do it, where both parties request the court to charge the jury to bring in a verdict in favor of himself. So we find no error in this record, and we affirm the judgment.

Metcalf & Cinniger, for plaintiff in error.

E. G. Johnson, for defendant in error.

1904.]

Lucas County.

UNLAWFUL SALE OF SKIMMED MILK.

[Circuit Court of Lucas County.]

ALBERT S. GUILDER V. THE STATE OF OHIO.

Decided, January 25, 1904.

Milk—Dairymen not Exempt—From Statute Prescribing that Skimmed Milk—Can be Sold Only from Plainly Marked Cans—Meaning of the Word "Dealers"—Application of Police Regulations.

1. Police regulations are not to be interpreted as are revenue laws, which admit of favored classes, but must be applied with the purpose of preventing all persons from doing the thing prohibited.
2. The word "dealer", therefore, as used in Section 4200-11, relating to the sale of skimmed milk, includes one who sells milk obtained from his own cows, as well as one who buys and sells milk.

PARKER, J.; HAYNES, J., and HULL, J., concur.

This is a proceeding in error brought to obtain a reversal of a judgment of conviction of the plaintiff in error in the police court of this city because of the violation of a certain provision of the dairy and food laws of the state. The judgment of the police court was afterwards affirmed by the court of common pleas. The plaintiff in error seeks to reverse both judgments.

The section under which the plaintiff in error was prosecuted is 4200-11, being Section 3 of an act found in Vol. 86, Ohio Laws, at page 229. It reads:

"No dealer in milk, and no servant or agent of such dealer, shall sell, exchange, or deliver, or have in his custody or possession, with intent to sell, exchange or deliver, milk from which the cream or part thereof has been removed, unless in a conspicuous place, above the center upon the outside of every vessel, can or package from which or in which such milk is sold, the words "skimmed milk" are distinctly marked in uncondensed gothic letters not less than one inch in length. Whoever violates the provisions of this section shall be punished by the penalties provided in Section 1."

The penalty provided in Section 1 is, for the first offense, a fine of not less than fifty dollars nor more than two hundred dol-

lars. This appears to have been the first offense charged against the plaintiff in error.

It appeared upon the trial of the case in the police court that the plaintiff in error was the owner of a dairy, and that all the milk which he had was the product of his own dairy; that no part of the milk which he was engaged in selling had been obtained, by purchase or otherwise, from others, and it was there contended on behalf of Guilder, and is contended here, that he does not come within the class of persons who are prohibited from carrying milk for sale unless they have the packages marked as prescribed by this section; that is to say, that he was not a "dealer" in milk, because he was not engaged in buying and selling milk—he was selling the product of his own dairy. Counsel for plaintiff in error has furnished us with a brief in which he cites a number of cases where the word "dealer" is defined, and in all those cases the "dealer" is described and defined as one who makes a business of buying and selling, as a middleman between the producer and consumer of the article. We are cited to Vol. 5 of The American & English Encyclopoedia of Law, at pages 122-123, First Edition, where in the text it is said, under the heading of "Deal" and Dealer", that it is "To trade; to buy and sell for the purpose of gain; to traffic; to have to do with." "A dealer is therefore one who makes a business of buying and selling; he is the middleman between the producer and consumer of a commodity." A large number of cases are cited in support of this definition. Most of them are cited in the brief of counsel for the plaintiff in error. Among the cases cited are *Norris Bros. v. Commonwealth*, 27 Pa. St., 494; *Commonwealth v. Campbell*, 33 Pa. St., 385; and in the case of *Barton v. Morris*, 10 Philadelphia (Penn.), 360, it is said:

"A farmer who sells the product of his farm, and occasionally that of his neighbors, at a market-stand in a city, is not a dealer. He does not buy, but only sells."

Ex Parte Herbert, 2 Vesey & Beames' Repts., 399, and *Overall v. Bezean*, 37 Mich., 506, are also cited.

It is urged by counsel for plaintiff in error that the word "dealer" is, therefore, a word that has a fixed legal meaning

1904.]

Lucas County.

and that it must be presumed that the Legislature, in the enactment of this statute, used the word in the sense defined in these cases, and that since the plaintiff in error does not come within the class described in the statute, the conviction was wrong and should be set aside. Attention is called to the fact that in the statutes generally, respecting the adulteration of foods, and in other sections of the same statute, the terms used to designate the persons who shall be amenable to the penalty and who are subject to the prohibition, is general, *i. e.*, "whoever" does this or that; "any person" who does this or that; while in this particular section there is a *class* described, to-wit, "dealers."

On behalf of the prosecution we are not furnished with any authorities, and, indeed, no one has appeared before us to present the case; and, not having made a very thorough search for authorities ourselves, we are unable to say what may or may not be produced in the way of authority in opposition to the cases cited. The cases cited, however, in the brief of counsel for the plaintiff in error, and all that we have examined, are cases where the revenue laws of the state were under consideration; laws taxing dealers, or laws requiring them to procure a license before trafficking in certain products; and the holdings are in harmony with the general governmental policy, apparently a well settled policy, manifested in many statutes as well as in the decisions of courts, to exempt farmers and other producers selling their own products, or the raw material, and sometimes even exempting a manufacturer selling his products where the manufacture is from the raw materials, and especially those raised or produced by the manufacturer. A great many examples of this policy may be found in the statutes of our own state. I call attention to Section 1653, paragraph 14. This section confers certain powers upon hamlets, and paragraph 14 provides that they shall have power to regulate peddlers. Section 2672-19, provides for the licensing of peddlers in certain cities—I believe the section applies to Cincinnati—and contains this provision:

"Provided, that any person selling agricultural produce of his own raising shall not be liable for license for selling, hawking or

peddling the same in any mode or manner in the markets, public streets or alleys of said city."

Section 2669, which grants power to councils of municipalities generally to grant licenses, contains this provision:

"But nothing in this section shall be construed to authorize any municipal corporation to require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him, license to vend or sell in any way, by himself or agent, any such article or product."

And 4401 of the Revised Statutes, which is in the chapter respecting dealers and peddlers, provides for licenses and for penalties for selling without license, and provides that:

"If any person vend or sell in this state, as a peddler or a traveling merchant, any goods, wares, or merchandise, except such goods, wares and merchandise as are manufactured within this state by himself, or employer, without having first obtained a peddler's license so to do, he shall forfeit and pay," etc.

Another instance of this is found in the Dow Law, beginning with Section 4364-9 and running through and including 4464-23. This law lays a tax on the business of trafficking in intoxicating liquors, but defines the phrase "trafficking in intoxicating liquor" to mean the "buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time." It is somewhat significant that the Legislature deemed it necessary to limit the word "trafficking" so that it should not include certain sales by the manufacturer, but by the plainest implication has made it include even sales by the manufacturer, unless the liquor shall be manufactured from a certain class of material and the sales shall be made at a certain place and sold in certain quantities.

1904.]

Lucas County.

In the act respecting skimmed milk, involved here, the noun "dealer" of which the connate verb is "dealer" and the participial form is "dealing", a word set down by lexicographers as synonymous with "trafficking", when applied to transactions like that under consideration, there is no such limitation of its scope. In other words, in the use of the synonym "trafficking" the Legislature deemed it necessary to expressly exclude what it seems to have thought it would otherwise cover, to-wit, certain dealing or trafficking that would not have been included at all if the theory of counsel for plaintiff in error here is correct, *i. e.*, it has used the word "trafficking" as including sales by one who does not buy, unless such sales are of goods manufactured from raw materials and are made at a certain place and in certain quantities.

But, in looking to the mischief to be remedied by this statute governing the selling of skimmed milk we find that the evident purpose was to prevent frauds upon purchasers and consumers of milk, a staple article of diet, a food that is in universal use, and in respect to which frauds by adulteration and by dilution or subtraction, are very easily practiced and are insidious, and oftentimes dangerous in their results; and bearing in mind that many, if not most persons who make a business of selling milk sell from their own dairies—obtain their supplies from the milk of their own cows—we can not believe that it was the purpose of the Legislature to permit the sale of skimmed milk with impunity by this class while imposing a heavy penalty for the same act upon those who might buy their milk for sale. The fraud is as flagrant and the mischief as great in the one case as in the other. The moral turpitude is as great in the one case as in the other. We can think of no valid reason for exempting the one class from the prohibition and penalties of the act and including the other, and therefore we can not suppose that the Legislature intended to make such a distinction. In the cases cited—and the only cases we have examined—no such police regulation, designed to save the health and lives of people and to prevent the perpetration of such frauds was under consideration, but they dealt with quite a different class of laws, where, as I have said, the purpose seemed to have been

to prefer and favor the producer—not to bring him within the purview of acts imposing penalties for making sales of impure articles. In other words, the purpose of the law in each one of the cases cited was to raise a revenue and the policy of the law seems to have been to not require the contribution of revenue from those who sell their own products.

We hold that the word “dealer” in Section 4200-11 includes one who sells milk obtained from his own cows as well as one who buys and sells milk, and therefore the judgments of the lower courts will be affirmed.

Ritchie, Murphy & Phelan, for plaintiff in error.

W. G. Ulery, Prosecuting Attorney, for defendant in error.

**CONSENT OF INSURANCE COMPANY TO SALE AND
TRANSFER.**

[Circuit Court of Ashtabula County.]

SCOTTISH UNION & NATIONAL INSURANCE CO. v. G. P. BROWN.

Decided, 1908.

Fire Insurance—Consent of Agent to Sale of Property—Means Consent to All the Conditions of the Sale—Including the Placing of an Incumbrance Thereon.

Where an agent of a fire insurance company, who has authority so to do, enters upon the policy the consent of the company to a transfer of the property insured therein, the consent is binding upon the company whether the sale be all for cash, or part cash with a mortgage securing the balance.

LAUBIE, J.; BURROWS, J., and COOK, J., concur.

In this case the plaintiff company seeks to have a judgment set aside which was rendered against it in favor of the plaintiff below, Brown, in an action upon a fire insurance policy. We have examined with care all the alleged errors, and find that by reason of the condition of the law in this state substantially all are immaterial. It is evident from the statement of the facts in the pleadings and as shown in the evidence, that the consent

1904.]

Ashtabula County.

of the insurance company to the sale was, in effect, a consent to all the terms of the sale, including the giving of the mortgage.

At the time of the sale of the stock of goods from Wagstaff to Brown, Wagstaff, in behalf of himself and Brown, took the policy to the agent of the company, Mr. Booth, and made a statement as to the sale of the property by him to Brown, in good faith, without referring to the mortgage, in order to obtain the consent of the company thereto, and to a transfer of the policy to Brown; and such assent was placed upon the policy by Booth as the agent of the company. Booth had authority to do this, and to consent to the placing of a chattel mortgage upon the property. He had authority to issue policies, and was a general agent of the company. Having this authority, he entered this written consent of the company to the sale and transfer of the property from Wagstaff to Brown, and that consent operated as a consent to all the terms and conditions of the sale, whether it was a sale for cash, or part cash with security for the balance, or what not, and effected a valid transfer of the policy upon the stock of goods to its purchaser.

Whatever may be the law in other jurisdictions, it seems to be well settled in this state that such is the effect of such written consent, although not a word was said about the chattel mortgage.

In *Farmer's Ins. Co. v. Ashton*, 31 Ohio St., 477, the syllabus is as follows:

"It was stipulated in a policy of fire insurance, that if the property insured should be sold or transferred, or any change made in its title, without the assent of the company insuring, the policy should be void. The assured sold and conveyed the property for an agreed sum, to be paid in the future, the company assenting to the sale, but without knowledge of its terms. To secure the payment of the purchase price, the purchaser, at the time of the sale, and as a part of its terms, executed a mortgage of the property to the vendor, of which the company had no knowledge until after the property was destroyed by fire. *Held*: That the assent given by the company to said sale and transfer of title was an assent to the terms upon which the same were made, and, hence, that the execution of said mortgage did not avoid the policy."

The opinion was rendered by Boynton, J., and upon the assumption that the execution of the mortgage was a change of title, he says, page 479:

“The assent of the company was expressly given to the sale and conveyance by Francis Ashton to the defendant in error, and the mortgage back was a part of the same transaction, and one of its constituent elements.

“The assent given was in no wise qualified, or conditioned on a sale for ready money. Nor is it claimed to have been fraudulently induced or procured. We, therefore, must hold it to have been an assent to the sale and conveyance as actually made between the parties, and consequently an assent to whatever change in the title the execution and delivery of the mortgage effected.”

In the case before us, it is admitted that the written assent to the sale was made in writing upon the policy, and if the agent did not seek to find out what the terms of that sale were, whether for cash or not, was no concern of Brown's, but was simply a matter for the insurance company itself and its agent. The agent assented in the name of the company to the sale, and that included an assent to all of its terms and conditions.

We also find that there was no misconduct shown on the part of the jury, and that the amount of the verdict was not excessive. All other of the alleged errors are immaterial, as the plaintiff was entitled to recover in any event, and the judgment is affirmed.

Mr. Starkey: “They said in argument they did not rely upon the jury computing too much interest in this case, but if there is any question over it we would like to remit the amount.”

Judge Burrows: “You better remit it, as they might rely on it in some other court if they don't in this.”

Mr. Starkey: “We remit twelve dollars.”

Will G. Guenther and Theo. Hall & Son, for plaintiff in error.
Mr. Starkey, for defendant in error.

QUESTIONS UNDER THE BEAL LAW.

[Circuit Court of Wood County.]

FRANK FIKE v. THE STATE OF OHIO.

Decided November 28, 1903.

Beal Election Law—Irregularity in Publication of Mayor's Proclamation—Validity of Election can not be Impeached Collaterally in a Criminal Prosecution—Change of Venue—Final Jurisdiction—Mayor's Judgment for a Misdemeanor can not be Reviewed—On Weight of Evidence.

1. Election laws are to be construed liberally so as to preserve, if possible, and not defeat the choice of the people as expressed at an election.
2. Failure to publish for a full period of ten days the mayor's proclamation of a special election to be held under Sections 4364-20a, Revised Statutes, *et seq.* (commonly called the Beal Local Option Election Law), is not fatal to the validity of the election, where the election was otherwise regularly held, knowledge of its approach was general throughout the municipality, and a comparatively full vote was cast, and no attempt was made to deceive or mislead anyone, and it does not appear that any elector was either without knowledge thereof, kept from voting, or failed to vote on account of the failure to give ten days notice. Publication of notice for ten days, under such circumstances, is not jurisdictional, and failure to publish it for the full period is a mere irregularity which does not invalidate the election.
3. The validity of a special local option election held under Sections 4364-20a, Revised Statutes, *et seq.*, which resulted in the prohibition of the sale of intoxicating liquor within a municipality, can not be collaterally impeached by a defendant in a criminal prosecution for selling intoxicating liquor in violation thereof, notwithstanding he may have moved into the municipality after the election. The election provided by Section 4364-20a, is exclusive, and the general rule that a defendant in a criminal action may raise the constitutionality of the law under which he is prosecuted has no application to such cases.
4. Mayor's courts are without authority to grant a change of venue in misdemeanor prosecutions; final jurisdiction thereof is given such courts under Section 1817, Revised Statutes; Section 6529, Revised Statutes, providing for a change of venue before justices of the peace when the justice is a material witness in the case or is prejudiced is not applicable to mayors' courts.

5. The judgment of a mayor's court in misdemeanor prosecutions can not be reviewed upon the weight of the evidence. Section 6565, Revised Statutes, relating to bills of exceptions before mayors and justices of the peace only provides for a review on questions of law, not of fact; and Section 1752, Revised Statutes, only authorizes such review when the judgment is one of conviction for violating a municipal ordinance.

HULL, J. (orally); PARKER, J., and HAYNES, J., concur.

Error to the Court of Common Pleas, Wood County.

There are six of these cases, involving the same questions and the opinion of the court will be delivered in the case of Frank Fike.

These cases are in this court on petition in error to the judgment of the court of common pleas, that court affirming the judgment of the mayor's court of the village of Freeport in this county. This court is asked to reverse the judgments of both courts below. The plaintiffs in error were prosecuted and convicted before the mayor of the village of Freeport for the violation of certain provisions of the liquor law of this state known as the Beal Law, which provides for the regulation of the liquor traffic.

An election was held under the local option feature of this law in the village of Freeport on the 18th day of July, 1902, and at that election a majority of the electors who voted, voted in favor of prohibiting the sale of liquor; sixty-eight votes against such prohibition and a hundred and twenty-seven in favor; or, to put it in the language of the statute sixty-eight votes for the sale and a hundred and twenty-seven votes against the sale, making a hundred and ninety-five votes in all cast. Under the provisions of this law, after a petition has been duly filed as provided in the statute, an election is to be held after due proclamation has been made, and in case a majority of the electors vote against the sale, such sale from that time becomes unlawful within the limits of the municipal corporation. These plaintiffs in error, defendants below, were convicted and fined for an alleged violation of this law.

The chief contention, although there are other claims made upon this proceeding in error, is that the election was not a legal

1904.]

Wood County.

election, and that therefore the voters of this municipality have never lawfully chosen by ballot to prohibit the sale of intoxicating liquors within its limits. The ground of complaint is that the proclamation for the election signed by the mayor was not published for the period of ten days as required by the provisions of this law, Section 4364-24 providing that proclamation shall be made the same as for election of councilmen, which requires ten days publication of notice.

The proclamation in this case of the mayor giving notice of the election was dated by him as of the 8th of July, 1902, and called for an election upon the 18th of July to be published in the weekly paper, *The Prairie Depot Observer*, but it was not published until the issue of the paper of that week, which was the 11th day of July, 1902, notifying the electors that the election would be held on the 18th of July, thereby giving them only seven days' notice, if we exclude one day; eight days at the most—while the law requires ten days' notice.

It is claimed that this was fatal to the election; that this statute provides how the sale of intoxicating liquors may be prohibited by the people of a municipal corporation; that it is in a way permitting the people to make a law for themselves by vote, and it is claimed that before any valid election can be held, the requirements of the law must be complied with, and the notice must be given as required by the statute, and if not, that all proceedings are null and void, and cases are cited which it is claimed tend to sustain this proposition.

On the other hand, it is claimed by the State, the defendant in error, that if the evidence shows that there was no fraud, no intent to prevent the electors from having full notice of this election, and if the election was regularly held, and if the evidence shows there was a full and fair vote and general knowledge of the coming election in the community, that this failure on the part of the mayor to give notice the full time required by the statute would not invalidate the election. The record in this case shows that the petition was filed as required by law—the law requiring the signatures of forty per cent. of the electors—and that the election was held at the proper time after the petition was filed; and it shows that there was knowledge of the

coming election among the people in the community; that it was discussed upon the streets; that public meetings were held to consider and discuss the matter at which speeches were made, and there was work done pro and con, as the record shows by the voters of the municipality—some working for it as the election approached, and some working against it. There is no evidence that any person, whether elector or not, man, woman or child in this village failed to learn, or did not have notice of this election. There is no evidence that any voter was kept from voting, or failed to vote at this election on account of the lack of two or three days notice of the time required by law.

The election occurred in July and there were 195 votes cast. At the municipal election of the preceding spring there were 175 votes cast; at the presidential election held in 1900 there were more votes cast, but the reason for that was that the entire township vote was cast then. There were more votes cast at this election under the Beal Law than were cast at the preceding municipal election.

We are of the opinion that under this state of facts, the failure to give, in the respect I have mentioned, the notice, or rather publish the proclamation of the mayor, was not fatal; that that in itself was not sufficient to have this election declared invalid.

This question, and others of similar character have been before the courts of this country a great many times, and cases may be found, possibly, that would go so far as to hold this election invalid, but the great weight of authority is against it. The general doctrine is that mere irregularities, that do not go to the foundation of the election, will not invalidate the election, although the provisions of the statute have been technically violated, if it appears that there has been a fair election and a comparatively full vote, and no fraud or attempt to deceive or mislead. I should add further in connection with the facts in this case, that the election was held under the auspices and direction of the regular County Election Board, and that the regularly appointed judges and clerks had charge of the elec-

1904.]

Wood County.

tion, with perhaps one exception; one officer was sworn in that day to take the place of an absentee.

The general rule, as gathered from all the authorities, is stated in *The Am. & E. Ency. of Law*, Vol. 10, page 626 (2d. Ed.), where the author says:

“In the case of a special election, however, when the law does not fix the time and place for holding the same, but they are to be fixed by some authority, failure to give notice or issue a proclamation of the election (that is, failure to give any notice) will render it a nullity, unless the people have actual knowledge and attend, so that the result is not affected. If it appears that the people generally had actual knowledge of a special election, so that the result would not have been different if proper notice had been given, failure to give such notice does not vitiate the election.”

The case of *Dishon v. Smith* in 10th Iowa, page 212, is in point; this is found in the syllabus:

“Notices of Election: The provisions of Chapter 46, laws of 1855, ‘An act in relation to county seats,’ prescribing the time and manner of giving notices of the presentation of a petition for holding an election on the removal of the county seat, are directory merely, and the absence of such notice will not invalidate an election of which the people were duly notified. An election will not be invalidated by the omission of some duty by an officer charged with giving notice thereof, when such election has been duly ordered and held.”

I will read from page 218 of the opinion:

“In matters of such a public nature, the observance of each particular is not held a prerequisite to validity. And it is a general rule of law that statutes directing the mode of proceedings of public officers, relating to time and manner, are directory.”

And further on:

“But there is a peculiar fitness in the rule when applied to popular elections, in which case we may consider the character of the duties and of the men necessarily chosen to perform them. They are usually men not instructed in their duties nor in nice forms and distinctions. Many of the duties, too, are to be performed in haste and amidst confusion and without opportunity for deliberation.”

And further along:

“And it has been remarked, further, that the people are not to be disfranchised, to be deprived of their voice, by the omission of some duty by an officer, if an election has in fact been held at the proper time; and that such penalty ought not to be visited upon them for the negligence or willfulness of one charged with similar duties. Upon considerations like these the courts have held that the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken. In the present case whether there were notices or not, there was an election and the people of the county voted, and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise.”

So in the cases under consideration, it is not claimed by the plaintiffs in error that there was not full notice and knowledge of this election that was to be held, and it is not claimed that any voter was kept from voting, and as is said in another part of this opinion, in the same case this matter of notice is not jurisdictional in the case of an election, as it is in the case of beginning a suit in court. The court says:

“And it is further averred that there was no such notice in fact. It is an error to regard this as a jurisdictional matter. This idea pertains in cases where the courts acts judicially and in matters between party and party, and not to one of the nature of the present one, which is a vote of the people. Nor does the want of such notice invalidate the election.”

In a case in California, the election place was changed a short distance from the regularly appointed place, and the Supreme Court of California held that that would not vitiate the election.

In the 15th O. S., 532, a case is reported where an election was held invalid because there had been no notice of the election and no proclamation that such an officer was to be elected. This was an election to fill a vacancy in the office of probate judge; the court in the syllabus says:

“Where a vacancy is about to occur in the office of probate judge, by reason of the expiration of the term of an incumbent of that office, and the sheriff, in pursuance of the statute, in due

1904.]

Wood County.

time, prior to the day for the regular election, publishes his proclamation, giving notice of such election, and enumerating therein all the state and county offices to be filled at such election, except the office of probate judge, in respect to which the proclamation is silent; and, by reason of such misfeasance of the sheriff, the great body of the electors of the county are misled, and have no notice, either official or in fact, of an election to fill the office of probate judge; but, nevertheless, a small number of the electors of the county, less than one fourth of the whole number of voters at that election, cast their votes for a single candidate, and no votes are cast for any other, such attempted election is irregular and invalid."

But no such state of facts exist in this case, where, as I have said, there was a larger vote than at the preceding municipal election and there was a general knowledge of the election. Judge Brinkerhoff speaking for the court says, p. 537:

"In deciding this case, however, we do not intend to go beyond the case before us, as presented by its own peculiar facts. We do not intend to hold, nor are we of the opinion, that the notice by proclamation, as prescribed by law, is *per se*, and in all supposable cases, necessary to the validity of an election. * * * We have no doubt, that where an election is held in other respects as prescribed by law, and *notice in fact* of the election is brought home to the great body of the electors, though derived through means other than the proclamation which the law prescribes, such election would be valid. But where, as in this case, there was no notice, either by official proclamation, or in fact, and it is obvious that the great body of the electors were misled, for want of the official proclamation, its absence becomes such an irregularity as to prevent an actual choice by the electors, prevents an actual election, in the primary sense of the word, and renders invalid any semblance of an election, which may have been attempted by a few, and which must operate, if it be allowed to operate at all, as a surprise and fraud upon the rights of the many."

As stated by the court in this case, where there is no general knowledge of an election, or such a lack of knowledge that only one man was a candidate for the office—a case like that is not in fact an election—it is merely a few electors getting together and appointing a man to the office. That was not the case here. The general doctrine of the cases, and the authorities is, that election laws are to be construed liberally, so as to preserve, if

possible, the choice of the people as expressed at an election, and not to defeat it as is said in substance, by Judge Cooley in his work on Constitutional Limitations, page 778.

In the case of *Harpster v. Brower*, 5th C. C. Rep., 395, a question similar to the one under consideration here was raised. This was a special election upon the question as to whether a town hall should be erected in the township, and the statute under which the election was to be held required notice to be given thirty days, and the notice that was given lacked six days of the time, and it was claimed that the election was invalid. The second paragraph of the syllabus is as follows:

“An election will not be declared void because the notice required by statute was not given for the full length of time specified, when it appears that the great body of electors had actual notice of and participated in the election.”

Judge Moore says in the opinion, that in view of the facts in the case it was not an absolute necessity that they should pass upon the question, but they did give their views upon it as stated in this paragraph of the syllabus which I have read.

A recent case in Washington is in point (58th Am. Dec., page 38, the case of *State v. Doherty*); the Supreme Court of that state say: “Formalities in giving notice prescribed by statute are regarded as directory merely, unless there is a declaration that a failure to observe a particular formality shall render the election void. An election will, therefore, not be declared invalid for the omission of some formality in the notice, if it appears that the time and place of holding the election and the questions to be submitted had become matters of general notoriety, and that the great body of electors participated in the election.”

The provision in the Beal Law requiring notice is found in Section 4364-24:

“And notice shall be given and the election conducted in all respects as provided by law” for the election of members of the council of the corporation, so far as said law may be applicable.

But there is no provision that unless this requirement as to notice is complied with strictly, the election shall be void. We

1904.]

Wood County.

hold, that, notwithstanding this irregularity in the matter of notice, the election was valid and binding upon all the people of the municipality of Freeport.

It is urged further by counsel for the State that this question can not be raised in this proceeding; that upon a plea of not guilty under a prosecution for a violation of the law, the defendant can not be heard upon the question of the validity of the election for the reason that the statute itself provides a method for contesting the validity of the election, and it is urged that that method must be followed.

This provision is found in Section 4364-20i, which provides:

“Any person being a qualified elector of any municipal corporation wherein an election shall have been held as provided for in this act, may contest the validity of such election by filing a petition duly verified with probate court of the county in which such municipal corporation is situated, within ten days after the election, setting forth the grounds for contest.”

And then follows the procedure: The jury shall be summoned, etc., and the method of procedure of the contest before the probate judge. It is urged by the plaintiff in error that a defendant in a criminal case has the right to raise the question of the validity of the law at any time. This is undoubtedly true generally, but the question here is rather whether he can question the validity of an election of an official before whom he is being tried, or the validity of an election held under such a statute as this, or whether such question must not be determined in an election contest as provided by law, and we are of the opinion that this question can not be raised as has been sought to raise it here; that the validity of this election can not be attacked collaterally. The constitutionality of an act may be raised in this way, but the general rule is, and so far as we can discover, the universal rule that an election contest can not be injected into a criminal prosecution by attacking the validity of such an election as this, and we think that has been settled by the Supreme Court of this state, by a case that went from this county. It is the case of *Peck v. Weddell* in 17th Ohio State, page 271. This was a county seat contest; a contest between Bowling Green and Perrysburg where an election had

been held, and it was claimed that various frauds had been committed for the purpose of showing, or attempting to show that a majority of the people of the county desired to have Perrysburg for the county seat. The court say in the second paragraph of the syllabus:

“That allegations of fraud and illegality in conducting the election, constitute no sufficient ground for such injunction. Wrongs of such a nature can be inquired into and redressed, only by means of a contest of the election, pursuant to the provisions of the act of April 18th, 1857.”

Here was a claim of fraud and illegality in conducting an election. The claim in the case before us is that there was a fatal defect in the matter of notice. The court in the case cited held that such a question must be determined in a contest, and on page 284, Judge Scott, delivering the opinion of the court, says:

“It is evident that this mode of inquiring into alleged frauds in elections, and of ascertaining the will of the majority of the electors as expressed by the legal ballots, would be very illy adapted to accomplish the end proposed, and would be as likely to facilitate the perpetration, as the correction, of frauds against the public. But the remedy by contest under the statute is speedy, appropriate and adequate; it affords an opportunity of being fully heard, to everyone interested; and the decision of such contest is by a judgment which binds all the world. The specific remedy having been given by statute, and being the sole remedy adapted to the ends of speedy justice, there is no reason why a court of equity should intervene, by injunction, until the facts alleged in the petition have been found, upon such contest. It was held by this court in *State v. Berry* (14 Ohio St., 315), that a contest is the specific and sole remedy provided by statute for the correction of all frauds, errors, and mistakes which may occur in the process of ascertaining and declaring the public will, as expressed through the ballot-boxes.”

As stated by Judge Scott, the question was first decided in the case in the 14th Ohio State, to which reference is made. The Constitution itself requires the Legislature to make provision for the contest of all elections. Article II, Section 21, is in this language: “The General Assembly shall determine by

law, before what authority, and in what manner, the trial of contested elections shall be conducted;" and the General Assembly in this case determined and declared, in the statute which I have read, how the election contest, growing out of such an election as this and before what authority, should be determined.

The case in the 15th O. St., page 114, is to the same effect, the syllabus reading:

"A specific mode of contesting elections in this state, having been provided by statute, according to the requirements of the Constitution, that mode alone can be resorted to, in exclusion of the common law mode of inquiry by proceeding in *quo warranto*. The statute which gives this special remedy, and prescribes the mode of its exercise, binds the state as well as individuals."

The question in this case was whether the State would be bound the same as an individual might be by such contest, and the Supreme Court held that the State would be bound as well as the electors of the community. They say on page 135 of the opinion:

"We think that it was clearly intended that the State should be bound. In our system of popular government, as between candidates who are legally eligible, an absolute right of choice belongs to the electors, to be exercised according to their sole discretion, and when their votes have been canvassed, and the result publicly declared, if all the electors of the proper district, whose will is entitled to absolute control, are satisfied with the fact thus declared, we perceive no good reason for allowing that fact to be questioned in any other quarter."

In the case at bar the election having been held, the result having been declared, and the people having expressed their choice, the law has become fixed and whoever comes into the municipality thereafter is bound by it. It is urged in this case that if there was a defect in the notice of the election it ought not to be held valid against one who moved into the municipality afterwards and had no opportunity to contest. We think this objection is not well taken. He must submit to the will of the people expressed before he came into the community. The 26th O. S., p. 216, is also in point, especially on page 221,

and an earlier case in the 8th Ohio, p. 375, is to the same effect.

In the case of *State v. Cooper*, 101 N. Car., 684, found in 8 S. E. Rep., 134, the Supreme Court of North Carolina say:

“The ascertainment and declaration of the result of the election was *prima facie* correct, and it was conclusive until, in a proper action brought for the purpose, the true result otherwise should be ascertained by a judicial determination. The law contemplates and intends, generally, that the result of an election, as determined by the proper election officers, shall stand and be effective until it shall be regularly contested and reversed, or adjudged to be void by a tribunal having jurisdiction for the purpose. * * * The law does not provide for such continual and repeated contests in every case that may arise. It intends that one contest, properly instituted for the purpose, shall establish the validity or invalidity of the election questioned.”

We hold that a defendant being prosecuted under this statute, can not defend upon the ground that is urged in this case; that can only be taken advantage of by a contest of the election according to the provisions of this statute.

There are two other objections made which I will refer to briefly. The cases were tried without a jury. A change of venue was asked before the mayor on the ground that he was biased and was a material witness. We find no provision in the statute permitting a change of venue on this ground in a prosecution before the mayor. Section 1744 provides that the mayor within the limits of the corporation shall have all the jurisdiction and powers of a justice of the peace, etc. Section 6529 provides for a change of venue before a justice of the peace. Section 1817 provides for the final jurisdiction of the mayor in cases of misdemeanor:

“He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is by the Constitution entitled to a trial by jury; and his jurisdiction in such cases shall be co-extensive with the county.”

There is no provision in the statute for a change of venue from the mayor's court in a case of this kind where a man is being tried for a misdemeanor.

1904.]

Wood County.

It is urged further that the conviction of the defendant and the judgment of the mayor was against the weight of the evidence. Without discussing the question at any great length I will say that we hold that under the statutes in this state, a judgment of the mayor in cases of prosecution for a misdemeanor can not be reviewed upon the weight of the evidence. There is no provision in the statute for such review. Section 6565 relates to bills of exceptions before a justice of the peace, mayor and police judge, but that section only provides for a review on questions of law and not on questions of fact; and it has been held in the 26th O. S., 447, and the 34th O. S., 11, that the judgment of a justice of the peace can not be reviewed on the weight of the evidence under this section; also in 7 C. C., 208. Section 1752 is sufficient to permit the review on the weight of the evidence of a judgment of a mayor on a conviction for the violation of an ordinance, but is silent as to misdemeanors. So that we find that there is no provision for the review of a conviction before the mayor of a misdemeanor on the ground that the judgment is against the weight of the evidence; we therefore decline to consider these cases and have not considered them upon that question.

We find no errors in the record and the judgments in all the cases will be affirmed.

Frank Sala and James, Millard & Powell. for plaintiff in error.

E. G. McClelland, Prosecuting Attorney, and *Wayne B. Wheeler,* for defendant in error.

WHAT MAKES A POLICY OF INSURANCE AN OHIO CONTRACT.

[Circuit Court of Hamilton County.]

**ABRAHAM PLAUT, ADMINISTRATOR OF THE ESTATE OF MICHAEL
SCHRADZKI, DECEASED, v. THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK.***

Decided, January 7, 1899.

*Life Insurance—Policy Issued by a Foreign Corporation—Becomes
an Ohio Contract, When—Application of Section 3629.*

1. Where application for a policy of insurance is made in Ohio, and the policy delivered in Ohio, and the premiums paid in Ohio, such policy is an Ohio contract and governed by the laws of Ohio, notwithstanding the policy is issued by a New York corporation.
2. Where a policy of insurance was issued prior to 1879—*Held*: That the provisions of Revised Statutes of Ohio, Section 3629, do not apply.

HALE, J., CALDWELL, J., and MARVIN, J., of the Eighth Circuit, sitting in the First Circuit; opinion by MARVIN, J. (orally).

This case comes here on a petition in error, the plaintiff here being the plaintiff below, the defendant here being the defendant below.

The case was tried below without a jury, that being waived, to the court, and it resulted in a judgment for the defendant. A motion for a new trial being overruled, a petition in error was filed here. There is a bill of exceptions in the case, which purports to state all the evidence. Among the items of evidence was an agreed statement of facts, and in that agreed statement of facts it was agreed that the will of Hannah Schradzki should be read in evidence, and it was not copied, and we have nothing in the record to show what that will was, except the testimony of Fechheimer, who was executor of the will, and he testifies as to certain provisions about it; but in the view we take of the case as to what it is, is not material, but I call attention to it

* Affirmed by the Supreme Court, without report, December 3, 1901 (65 Ohio State, 586).

1904.]

Hamilton County.

as being a fact that there is nothing in the record to show more than I have stated as to what the will is.

The facts are these: Michael Schradzki and Hannah Schradzki were husband and wife; they both died without children. Hannah died in 1887, and Michael died in 1894. In 1868 or '69, policies of insurance were issued upon the life of Michael. Two policies were issued, one on the 20th of April, 1868, for \$3,000, and the other on the 24th of April, 1873, for \$1,000. The beneficiary named in each policy was Hannah Schradzki, the wife of Michael Schradzki, whose life was insured.

The premiums upon those policies, and each policy was paid during the lifetime of Hannah Schradzki by Hannah Schradzki. Hannah Schradzki died intestate, bequeathing her property in certain bequests to persons named in her will, and the balance of her property, I believe, to a certain charity. After the death of Hannah, the executor of her will paid the premiums on each of these policies up to the time of the death of Michael Schradzki. The policies in each case provide that payment shall be made of the amount insured to Hannah Schradzki, and if not living to her children, or their guardian, or their issue, in sixty days after due notice and proof of death.

As has been already said, these parties died, neither of them having any children. So that when Michael Schradzki, whose life was insured, died, there was no one in existence who by the terms of the policies would be entitled to payment.

The plaintiff here is administrator of the estate of Michael Schradzki; he says that he is entitled to have this money paid to him, because of there being no person in existence to whom the insurance should be paid by its terms, and that Section 3629 of the Revised Statutes of Ohio applies. That statute was passed in 1879, and it provides that:

"Any married woman may by herself, and in her own name, or in the name of any third person, with his assent as her trustee, cause to be insured the life of her husband, for her sole use, for any definite period, or for the term of his natural life, and if she survives such period or term the amount of insurance becoming due and payable by the terms of the insurance shall be payable to her, to and for her own use free from the claims of the representatives of the husband or any of his

creditors; a policy of insurance on the life of any person, duly assigned, transferred or made payable to any married woman, or to any person in trust for her or for her benefit, whether such transfer is made by her husband or other person, shall inure to her separate use and benefit, and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the same, or his creditors; and the amount of the insurance provided for in the preceding section, or this section, may be made payable, in case of the death of the wife before the period at which it becomes due, to his, her or their children for their use, as shall be provided in the policy of insurance, or to their guardian, if under age; but if there are no children upon the death of the wife, such policy shall revert to and become the property of the party whose life is insured, unless it has been transferred as hereinafter provided."

Now, it is said this section controls in this case, and that the amount provided for in the policy shall therefore be paid to the representative of the husband, the administrator of his estate.

Before going further it should be said that it is urged upon the part of the insurance company, that the disposition of this fund should be governed by the laws of the state of New York. It is a New York corporation, the policy was issued in New York. The facts are that the application was made here, and the policies were delivered here, the premiums were all paid here, and we think (under the authority of the case of *Cross v. Armstrong*, 44 Ohio St., 621-2) that this is an Ohio contract, to be governed by the laws of Ohio. But we think, as announced in the opinion of Judge Burket in the case of *Ryan v. Rothweiler et al.*, in 50 Ohio St., 602, that the statute to which attention has been called does not apply. It may be said that it was *obiter* upon the part of the court to say what was there said, but we are content with the reasoning given and follow that opinion. The language of the judge is, that Section 3629 having been passed after the policy was issued, could not affect the rights of the parties.

That being true, this is the situation. I ought to say that it was said in argument as to the will of Hannah Schradzki that the executor was authorized by the will to spend for the surviving husband not only the income of the estate, but such part of the property as was necessary for his support, and the

1904.]

Hamilton County.

executor states further that he not only paid the income in support of the husband, but he spent more than the income.

The situation, then is, that Hannah Schradzki paid all the premiums on the policies; she died testate, and by her will she disposed of her property. The executor of the will paid out of her estate from that time on all the premiums, and nothing was ever paid upon these policies by anybody except Hannah Schradzki and the representative of her estate, the executor of her will. The statute does not apply.

The policies at the time of her death were hers; they became part of her estate; nothing was done afterward that transferred that interest from her estate to her husband. That being true, judgment for the defendant was right.

Nothing has been said in the opinion about the matter of estoppel; but we do not think there was any estoppel from making a claim by anything that he did. It was said that the defendant was estopped; but that is immaterial. We hold that they were the property of the wife at her death, and the policies became a part of her estate, and would come under the provisions of her will, whether the policies are named in the will or not.

Judgment affirmed.

Smith & Kuhn, for plaintiff.

Cohen & Mack and *Stephens & Lincoln*, for defendant.

INJURY TO PROPERTY FROM OPERATION OF RAILWAY.

[Circuit Court of Hamilton County.]

THE CINCINNATI CONNECTING BELT RAILROAD COMPANY v. WILLIAM BURSKI.

Decided, February, 1904.

Railways—Depreciation of Property from Operation of Damnum Absque Injuria—Consequential Damages.

Where a steam railroad is constructed by a railroad company on its private right of way adjacent to improved real estate, which becomes depreciated in value from the smoke, noises, cinders, etc., necessarily caused by the operation of said railroad without negligence, the resulting injury is "*damnum absque injuria*," and does not give rise to a cause of action. The law as to consequential damages laid down in *Parrott v. Railway*, 10 O. S., 624, is still the law of Ohio, except as modified in Section 3282, Revised Statutes, Ohio.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

William Burski and wife brought an action in the court of common pleas against the Cincinnati Connecting Belt Railroad Company for damages.

The gist of the action is thus set out in the petition. The Cincinnati Connecting Belt Railroad Company has constructed a railroad upon piling, a trestle very near his house, and by reason of this construction and the operating of the railroad by reason of the smoke and cinders from the engine, the danger from sparks, the noise of the trains and the jarring of the house caused by said trains, makes their home uninhabitable and untenable, and deprives them of the comfort and enjoyment of their property.

The defendant railroad company filed an answer setting up that they had built the railroad in question on their own property and denying all other allegations.

The case went to trial and the jury rendered a verdict for \$500 and judgment was rendered by the court for the amount of the verdict. This action is brought in this court to reverse this judgment.

1904.]

Hamilton County.

The evidence is to the effect that the operation of the railroad has seriously damaged the property of Burski. The noise, cinders, smoke and jarring caused by the running of trains in front and near Burski's house has naturally caused great damage, and as to such damage the verdict of the jury is abundantly sustained by the evidence.

One item of the evidence that was produced at the trial was to the effect that the railroad company had constructed near Burski's residence a chute and side-track, where coal was stored and dumped into wagons, and that when the coal was being dumped and the wind was blowing from that direction, coal dust was blown into and on the plaintiff's premises to such an extent as to cause great damage to plaintiff's property. But this is not alleged in the petition as a ground for damages, but this evidence appears to have been incidental only to the cause as alleged in the petition, and the case does seem to have been tried on this as an issue. So that the verdict can not be sustained on this evidence alone under the state of the pleadings and the issue as actually tried.

The second proposition of the syllabus in the case of *Parrot v. C., H. & D. Railway Company*, 10 O. S., 625, is as follows:

"That in respect to the noises, smoke, vapor or other discomforts arising from the ordinary use of the railroad by the company, the occupant and owner of such lot and dwelling house has no more right to recover damages of the company than any citizen who resides or may have occasion to pass so near the street and railroad as to be subjected to like discomforts. That a railroad authorized by law and lawfully operated can not be deemed a private nuisance."

Under the facts in this case which arose in 1852, there was no right of recovery from a railroad company while occupying a public street; this principle of the law as to public streets has been changed by Section 3283, Revised Statutes, which was passed in 1857, but except as to streets it is the law in Ohio to-day. And not only is it the law in this state, but in all the states so far as we have been able to investigate.

This principle is recognized as the law, in the case of *The Baltimore & Potomac Railroad Company v. Fifth Baptist*

Church, 108 U. S., 317, which is relied on by the defendant in error in this case. On page 331, Justice Field says:

“Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation. But the case at bar is not of that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff.”

In this case there is no allegation that the railroad company had constructed or has operated its road in an unreasonable way, nor is there any evidence, other than that in regard to the side-track and coal chute above referred to, which tends to show an improper and unreasonable construction and operation of its road.

What Burski may be able to show under proper allegations as to the construction of this coal chute and side-track near his house, we can not say, but under the pleadings and evidence as presented in this record, we feel bound to hold that the judgment is not sustained by the evidence, and the judgment is therefore reversed and cause remanded for further proceedings.

Hollister & Hollister and Walter A. DeCamp, for plaintiff in error.

A. H. Bode and W. W. Pease, contra.

IMPRISONMENT UNTIL FINE AND COSTS ARE PAID.

[Circuit Court of Summit County.]

SIMEON CAMERON SMITH V. STATE OF OHIO.

Decided, October Term, 1902.

Criminal Law—Statutory Provisions in Cases of Felony and Misdemeanor—As to Imprisonment Till Fine and Costs are Paid—Conviction for Abandonment of Child.

The statutory provision that a convicted person may be imprisoned until his fine and costs are paid applies only to misdemeanors, and where such an error is made a part of the sentence of one convicted of a felony, error will lie to a refusal to eliminate that portion of the sentence.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

The plaintiff in error was convicted upon an indictment charging him under Section 3140-2, Revised Statutes (94 O. L., 105), with having unlawfully, knowingly, willfully and negligently neglected, refused and failed to provide his child, Rilla Smith, with a proper home, support and care.

After conviction the court pronounced sentence that "the defendant, Simeon Cameron Smith, be confined in the workhouse at Canton, Ohio, for the period of three months, and that he pay the costs of this prosecution and to stand committed until said fine and costs are paid, or he be otherwise legally discharged."

Thereafter there was filed in the court of common pleas a motion by said Smith to modify this sentence by "eliminating that portion of said judgment which orders that the defendant stand committed until the costs of the prosecution are paid, or defendant is otherwise legally discharged." This motion was overruled by the court.

The errors complained of are that the court was without authority of law to pronounce, as a part of the sentence of the prisoner, that he stand committed until the fine and costs were paid, and that the court overruled the motion for a modification of this sentence.

The petition in error is well taken.

The statute (Section 3140-2, Revised Statutes) under which the plaintiff in error was convicted, authorizes punishment "by imprisonment in the penitentiary for not more than three years, nor less than one, or in a county jail or in a workhouse at hard labor for not more than one year, nor less than three months." There is nothing in this section which authorizes the imprisonment of the convicted party until the fine and costs are paid, nor is any authority found in any section of the statute for such imprisonment where one is convicted of a felony. The section under which this conviction was had, in terms, provides that whoever is guilty of the offense charged in the section is guilty of a felony.

Section 6795, Revised Statutes, defines a felony in these words:

"Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors."

Section 7327, Revised Statutes, provides:

"When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced shall remain confined in the county jail until the fine and costs are paid, or secured to be paid, or the offender is otherwise legally discharged."

This section is under the caption, "Execution of sentence for misdemeanor." And it seems clear that the sections under this heading are confined to cases of misdemeanor. The language of the several sections, wherever the court is spoken of, is "court or magistrate" or the words "magistrate or court," clearly indicating that the cases to which these several sections apply are those which may be finally disposed of by a magistrate, and do not include cases of felony.

Entertaining these views, we hold that the sentence, in so far as it included imprisonment until the fine and costs were paid, is erroneous, and the court should have granted the motion to modify the sentence in that regard.

1904.]

Lucas County.

The case is remanded to the court of common pleas with the direction that the modification of the sentence be made as herein indicated. The remainder of the sentence is in force as pronounced. The costs of the proceedings in error will be taxed to the defendant in error.

W. R. Talbot, for plaintiff in error.

H. M. Hagelbarger, Prosecuting Attorney, for defendant in error.

BUILDING ASSOCIATIONS—USURY.

[Circuit Court of Lucas County.]

HASKEL A. SPIES ET AL. v. SOUTHERN OHIO LOAN & TRUST CO.

Decided, 1902.

Premiums and Fines—Imposed by Building Associations—When Reasonable are Not Usury—Section 3836-3 Not Unconstitutional.

The provision of Section 3836-3, declaring that dues, fines, premiums or other assessments imposed by building and loan associations shall not be deemed usury, although in excess of the legal rate of interest, is not unconstitutional. *Mykrantz v Globe Building & Loan Association*, 19 C. C., 51, not followed.

In this action the Southern Ohio Loan & Trust Company, a building and loan association organized under the laws of Ohio, brought suit against Spies and others to foreclose a mortgage executed by Spies and his wife to this company, securing a loan of \$1,000, advanced to him on his stock for that amount in the company, and also to secure the payment of interest, premium, fines and other charges which might be assessed against him by the company. Default having occurred the company sued for the principal of \$1,000, together with \$17.71 interest and premium and \$3 fines, and further alleged that there would become due and payable from and after July 13, 1900, fifty cents a month as dues on each \$100 share of stock, and also interest at the rate of six per cent. per annum, premium at the rate of 16 2-3 cents per month on each share, and fines at the rate of

ten cents a month on each share, so long as the defendant remained in default for payments. The defense set up on behalf of Spies was that the fines were unreasonable, and that Section 3836-3 under which building and loan companies collect premiums is unconstitutional. Judge Pugsley in the common pleas court sustained the constitutionality of the statute and entered judgment for the full amount claimed.

HAYNES, J.; PARKER, J., and HULL, J., concur.

In this case suit was brought to foreclose a mortgage upon a loan made by the defendant company, which is an incorporated building and loan association of the city of Cincinnati. A judgment was taken for the full amount prayed. The case is brought up on error raising questions as to whether certain payments made by way of premiums and fines charged by the company are in the nature of usury; and whether the law of Ohio regulating these companies is unconstitutional. The case of *Mykrantz v. Building & Loan Assn.*, 19 C. C., 51, has been cited by plaintiff in error. We have not time to discuss this case at length, but we have investigated this matter fully and carefully under the decisions of the Supreme Court, and are satisfied that the decisions of the Supreme Court are in favor of the companies. We have heretofore sustained cases in which the building and loan association law has been held constitutional; and now sustain these charges in this case as being reasonable under a constitutional law.

The judgment of the court of common pleas will be affirmed.

Herbert Orr, for plaintiff in error.

Orville S. Brumback, for defendant in error.

FRAUD IN THE SALE OF AN OIL LEASE.

[Circuit Court of Wood County.]

HARRY JONES ET AL V. CHARLES H. DRAPER.

Decided, November, 1903.

Agency—Where the Agent Represented Both Parties—Sale of an Oil Lease—Subterfuge and Misrepresentation—Inspection Prevented—Fraud Upon Co-partners—Rights of Innocent Purchasers—The Sale Rescinded.

1. To relieve an agent from the suspicion of inconsistent duties, which *prima facie* will be assumed from the fact that he represents both parties, it is necessary that every circumstance connected with his employment by either party should be communicated to the other; and where the basis of the commission to be paid for his services was changed from usage to contract, and the amount to be paid from \$3,000 to \$6,500, such change was a circumstance affecting the action of the agent, and the failure to disclose it was a fraud in law.
2. The reply to a direct question as to what was the production of certain oil wells, that "I run two one-hundred barrel tanks a day," was a subterfuge and misrepresentation, where the fact was that the production alluded to was some weeks previous, while the production at the time the inquiry was made with a view of purchase was only fifty-three barrels a day.
3. If an inspection was prevented or its completeness defeated by the acts, arts or words of the seller, the reliance of the purchaser upon the statements of the seller without such investigation or after an incomplete investigation, would be justified.
4. Where evidence is introduced tending to show that one member of a firm committed or consented to the commission of a fraud upon his co-partners, notice on his part is not notice to them.
5. Nor will equity refuse aid to innocent purchasers because of a fraud committed upon them by a co-purchaser, and if their rights can not be secured without releasing him, they will not be allowed to suffer on that account.
6. Allegations having been established to the satisfaction of the court, that the plaintiffs were induced by the paid agent of the defendant, who they supposed was their agent, to purchase for \$60,000 an oil property which was only worth \$15,000, that the representations upon which they relied were untrue, and that their investigations

as to the value of the property were checked and prevented by the defendant. *Held*: That the contract of purchase be decreed void and the conveyance rescinded, and the money paid be restored with interest at 6 per cent., the purchase money notes canceled, and for the money expended by plaintiffs in putting the lease in condition to operate and in improvements, which have increased the value of the lease, they are to be given a lien on the lease and property.

MOONEY, J. (sitting in place of Parker, J.); HULL, J., and HAYNES, J., concur.

This case is here on appeal from the court of common pleas.

Plaintiffs in their petition allege, in substance, that some months prior to November 8, 1902, they undertook the promotion of a corporation to be known as The Cleveland-Scranton Oil Company, designed to engage in the business of developing, operating for, and producing oil in the Ohio oil fields, and to that end solicited numerous persons to subscribe and pay for stock of the corporation to be organized, said payments to be made to plaintiffs, as trustees, to purchase oil producing properties and to hold title to the same until such time as the proposed corporation should be organized and empowered to do business in Ohio, when said title should be conveyed to the corporation and stock therein issued to the contributors of the purchase price of said properties; that plaintiffs were then without experience in the oil business and had then no knowledge of the market value of oil producing properties in this state, and for these reasons they associated themselves with and employed as their trusted and confidential agent, to examine and select such oil properties to be purchased, one A. J. Thomas, of Findlay, Ohio, a man of great experience in the business of producing oil in the Ohio fields, and plaintiffs relied exclusively upon the business judgment and fidelity of said Thomas in making said selection and in closing said purchases; that among the properties selected by said Thomas as said agent were certain oil leases with the wells, machinery, fixtures and appliances then situated thereon owned by defendant at the price of sixty thousand dollars (\$60,000); that at the time of said selection by Thomas, and at all times thereafter until December 18, 1902, the wells on said leases were out of repair and not in actual operation, and for that reason it was impossible to

1904.]

Wood County.

ascertain what said wells were capable of producing when in repair and in proper working order; that defendant represented to plaintiff that said wells were then capable of producing at least forty barrels of oil daily, and that no wells had ever been drilled upon any part of said land except upon the outside edges thereof, and that the whole central area of said land was virgin oil territory with many inside locations defined and known to be prolific territory which had never been drilled to drain or deplete the oil in said land, upon all of which statements so made by defendant, these plaintiffs and their beneficiaries relied; that after all this and on November 8, 1902, said Thomas as said agent and confidential adviser recommended to plaintiffs, as said trustees, the purchase by them of said property of defendant for \$60,000; that on said day plaintiffs did accept a conveyance of said property for said price, less \$300 deducted therefrom for repairs, and then paid to defendant in money \$9,700, and delivered to defendant their notes aggregating \$50,000, which notes and money are still retained by defendant; that on said day plaintiffs took possession of said property, and thereafter expended a large sum of money to put said property in condition to operate and to determine the character and capacity of said wells; that plaintiffs have just discovered and now charge: First, that defendant paid said Thomas a large commission to induce him to recommend said property to plaintiffs and to procure said purchase by plaintiffs: Second, that the statement that no wells had been drilled within the central area of said land was and is untrue; Third, that the wells on said lease were not and are not capable of producing forty barrels of oil per day, nor any amount in excess of ten or twelve barrels per day; fourth, that both defendant and said Thomas at the time "they beguiled plaintiffs into making said fraudulent contract" well knew that the market value of said property did not exceed \$15,000; that plaintiffs before the commencement of this action tendered to defendant a reconveyance of said property and demanded a return of the money paid and notes delivered by them to defendant as heretofore stated, and defendant declined to accept said reconveyance or to comply with said demand.

The prayer is that said contract and conveyance be adjudged void; that said notes be canceled and said money be ordered returned; that the money expended by plaintiffs upon said property be found to be a lien upon said property and the amount thereof be ascertained on an account taken, and for all proper relief.

Defendant by answer admits the transaction, but denies the fraud. He states that long before said transaction, or any of said negotiations, said Thomas had been retained as a broker by him to make sales of said property, all of which was known to plaintiffs; that the defendant had been interested in said property only about one year, had been upon the same only a few times, and gave plaintiffs all the information he had concerning all the wells drilled on said lease in response to plaintiffs' inquiries. Defendant expressly denies that he stated that the central area of said property was then undrilled, but that on the contrary he stated that the same had been drilled, and that one of the wells drilled thereon had the reputation of producing 8,000 barrels of oil per day; defendant further states that he furnished plaintiffs with the pipe line statement showing the oil produced from said wells in July and August, 1902, and all of which facts were known to plaintiffs at the time of said sale. All allegations of the petition not admitted by the answer are denied. Plaintiffs by reply deny all the affirmative allegations of the answer.

The case was heard and submitted here upon these pleadings and the evidence. A transcript of the testimony given at the trial in the common pleas court was used here.

The objections made there appear in this transcript. We find no rulings there made on the evidence that we are very solicitous to charge, and counsel have argued no questions arising thereon which they deem important. We abide therefore by the rulings made below.

From the evidence it appears that Harry Jones, a resident of Cleveland, one of the plaintiffs here, prior to August, 1902, formed the purpose to associate himself with other persons, then undetermined by him, to purchase oil properties, organize a corporation to own and operate the same, and to reap a joint profit

for himself and associates by conveying the property so purchased to said corporation and selling the stock of said corporation to an amount sufficient to pay the cost price of the property and the amount of profit which the promoters might require. At this time Jones was without experience in or knowledge of the oil business or the market value of oil-producing properties. Jones made known his purposes and intentions to A. J. Thomas, of Findlay, who at that time was experienced in the oil business and was acquainted with the market values of Ohio oil-producing properties. An arrangement was entered into between Jones and Thomas whereby Thomas undertook to find, if possible, one or more oil properties that could be purchased and would be suitable for the proposed enterprise. At this time Thomas contracted to associate himself with Jones in the general plan. After this arrangement was made, Thomas learned that the defendant's property was for sale, and upon inquiry of Draper was informed that the price was \$60,000. On or about September 16, 1902, Jones, together with one Wilson, who as an expert was visiting the property in behalf of some intending investor or investors other than himself, met Thomas by arrangement and they went to the defendant's lease. Here they met one Hendricks, who at that time was with defendant a joint owner of this property. Wilson informed Hendricks that they had come to look over the property. Hendricks, in his testimony on cross-examination (Transcript, p. 112), details what he said as follows:

"Q. And he, Wilson, asked you some questions about the wells? A. Yes, sir.

"Q. And about the production? A. Yes, sir.

"Q. And what do you say you told him? A. I told him we were running about two one hundred barrel tanks a day then."

The fourteenth question after this, in the same cross-examination of the same witness is as follows:

"Q. Mr. Hendricks, you say that day, the day that Wilson was there, in the presence of Mr. Thomas and Mr. Jones, that you were asked what that lease was doing at that time? A. No, sir.

"Q. Was you not? A. No, sir.

"Q. Did you make any statement that day as to what that lease was doing? A. No, sir.

“Q. Did you not tell some one then that you was running two hundred barrel tanks a day? A. I said that I had run that.

“Q. What was the question put to you when you made that answer? A. They asked me *what it was doing*, and I told them I had run two hundred barrel tanks a day.

“Q. Did you not tell them that you were now running that then? A. No, sir; I did not.”

At about the time of this conversation, Draper arrived at the lease and Hendricks, to use his language, “turned the visitors over to him.” When Draper met the parties he was inquired of as to the production. He exhibited to the parties a pipe line statement, the extent of which as to time is in dispute. Draper says the statement covered all the time from October, 1901, to August 14, 1902. Jones disputes this and says the statement covered the first half of August, 1902, only. It is argued that Draper that day by wire ordered a statement covering the month of August, 1902, sent to Wilson at Findlay, because he wanted to base his report upon a full month’s statement, and Draper testifies that he, Wilson, wanted to make as good a showing as possible so that the deal would go through. (See transcript, p. 119). The records of the pipe line company do not show that Draper had any such statement as he testifies he had, but, on the contrary, show that the general statement sent him terminated July 31, 1902, and not on date of August 14, 1902. The records further show that Draper ordered and there was sent him a statement for the first half of August, 1902, and that on September 4, 1902, there was sent to him a statement for the whole month of August, 1902. The evidence (deposition of R. L. Bates) further shows that if a large month were wanted, and if defendant had the statement he says he had, that the largest month’s production would be for the month beginning July 15, 1903, and ending with the last item in the August half-monthly statement.

It will be noted that after August 14 there were eight tanks only in August, whereas there were fifteen tanks run from July 15 until the end of July. Moreover the distance between the water-marks in the paper still intact is 11 1-4 inches, while the distance between the marks on the upper part of the paper and

1904.]

Wood County.

upon that on which the August statement appears is only 9 7-8 inches. If the two parts were part of the same piece of paper, the distance between the marks would be the same. Since Mr. Draper's explanation does not explain why the month of August was embraced in a single statement to Wilson, since the records of the pipe line company are against his recollection of the facts, and since the physical appearance of the paper is also in dispute of his statement, it must be assumed and held that he is mistaken in his theory as to the extent of the statement he presented to Jones and Wilson on September 16, 1902. This leads to another inquiry. On that day, Draper had a statement for the entire month of August, 1902. It was sent him on September 4, 1902. He had run tickets also in his possession. He therefore knew what oil was produced in the month of August, yet he does not exhibit that statement. In the last half of August the lease averaged half a tank a day. In the first half of August the lease averaged one and one-half tanks per day, and some two days and some days three tanks were run. The first half of August was in line with what Hendricks had told the parties, the last half was not. Draper was there that day to see intending purchasers, yet he did not bring the last statement of production, nor did not exhibit it, but did bring another that was favorable to the property and its production. Afterward several other parties visited the lease. There were other parties who intended joining Jones in the purchase or intended to purchase stock in the company. Several of these testify that Draper made statements as to the production of the lease, stating it to be forty barrels per day or more. Draper denies that he made these statements. The average daily production of the lease in August, 1902, was 53 18-100 barrels; in September, 12 12-100; in October 6 56-100. During these months, at no time were all the wells equipped for pumping, and at no time were the equipped wells regularly pumped. At no time prior to November 8 did Thomas take any gauge of the wells. September 29, 1902, Jones took an option on the property which fixed the price a \$60,000. Thomas acted as Jones' agent in the transaction. October 22, this option having expired by limitation, it was renewed and extended "for such a length of time as will enable (defendant) first party

to put the twelve wells in operation and first party agrees to put the wells in operation as soon as possible and to extend the time of the within option until said twelve wells are fully equipped and operating to the satisfaction of A. J. Thomas both as to the operation of said lease, its production and its title." October 28, Thomas took a statement signed by Jones certifying that he, Thomas, was not a member or stockholder in the purchasers' combine, nor in the corporation, but was at will an employe.

When Draper first entertained the proposition to sell, he told Thomas that there would be five per cent. commission for selling the lease. Thomas informed Jones of this fact, and Jones concluded to divide the commission among the purchasers. Jones says that Thomas stated that by the usage of the oil business, a commission was always paid. This Thomas does not deny. Draper says that he asked Jones whether he was interested in the commission and Jones said "No, settle that with Thomas." Thomas did not know of this statement, and Jones denies it. Draper did not see Jones on the lease after October 28, when for the first time Thomas became solely interested in the commission to be allowed. On October 28, Thomas stipulated with Jones that the commission on the sale should be paid to Thomas as compensation for his services in the deal. About November 1, 1902, Thomas, who before that time had looked after plaintiffs' property as manager, quit their service in that capacity, and on that date stipulated with Draper that upon the close of the deal then pending between plaintiffs and defendant, Thomas should receive (if the property was purchased at the price of \$60,000) a commission of \$6,500. There is no pretense in the case that any of the plaintiffs except Jones knew of any commission at all, and no claim that Jones knew of any commission except five per cent. and that fixed by the usage of the business and not by contract. November 8 Draper and Thomas were in Cleveland and the deal was then closed, the money paid and notes executed as pleaded.

It is fair to conclude from all the evidence that the property from the time of taking the first option until November 8 was at no time worth in the market to exceed \$15,000. It is asserted by one or more witnesses that Draper represented that the central

1904.]

Wood County.

area was never drilled. Draper denies this, but upon the contrary states that he said the property had been drilled, and pointed out abandoned wells. He says though that he did say that the old territory was then usually redrilled, and that he pointed out where a line of wells could be established. There are several conflicts in the evidence upon important circumstances. One between Cook and Draper; one between Marr on the other hand and Draper and Thomas on the other, and one between Major Miller, and to some extent Bowler and Jones, on the one hand, and Draper and Thomas on the other. Cook says in substance that at one time when he was working for Draper as pumper on this lease and after these negotiations were commenced, he saw Thomas take a gauge of the tank. He told Draper, saying, "You are caught, Thomas is taking a gauge of the production." To which Draper replied "I can get Thomas." Thomas says he did take one gauge and never satisfactorily repeated it, and he as an expert oil man, paid for his services and paid well, whose power and duty it was to pass upon the production of the lease, never took a gauge of that production, and he was present when the deal was closed and knew that the east wells were not pumping because the power was not properly located, and two other wells were not then operating, nor were they completely equipped; and he says he held his peace, when every dictate of duty should impel him to speak, and the commission had grown from \$3,000 to \$6,500! In this view, Cook's statement is not very unreasonable. Marr succeeded Thomas as manager of the leases then owned by plaintiffs, and knew the condition of the property here in question. He met Draper and Thomas at Findlay on the eve of their departure for Cleveland to close the deal. It is conceded that they asked him to accompany them and that he refused. He says they wanted him to say that defendant's property was all right and in pumping condition and that he refused. This Draper and Thomas deny. This was the question, or one of the questions, upon which Thomas was to pass. He was to be paid for it, and Thomas was going to Cleveland. But why was Marr asked to go? The evidence does not satisfactorily answer this question, unless it be to shift responsibility from Thomas. This responsibility was one which Thomas then and

now was disinclined to assume. The testimony of Major Miller we accept as true. His testimony is clear, direct and reasonable. What attorney is there who would not feel inclined in a transaction of this magnitude to see that the interests of his client were secure? And if he started to make any inquiry he would, we believe, ask the very questions he says he asked, and would advise his client not to proceed unless the answers given were direct and satisfactory. That Thomas was averse to answering these questions is doubtless true, but that he was prepared to answer his presence there at that time for that transaction attested. We accept as facts in the case that Thomas, in the presence of Draper, who remained silent, a few minutes before the deal was closed, stated in the presence of Bowler, Jones and others that this lease was then producing forty barrels of oil per day; that it was then in proper operating order except two wells that could be set to pumping for three hundred dollars; that the property could be made to produce a hundred and forty barrels per day and that the central area of the tract had not then been drilled. Bowler and Jones do not now remember this statement, and therefore it does not appear that they relied upon it, but that statement is evidence that Draper before that time, as well as Thomas, had stated these facts as to the production of the property as so many witnesses testify.

October 3, Jones wrote Draper a letter and clearly invited the latter to falsify the production of the lease to a number of persons who would on a specified day visit it. Draper received the letter and filed it away in silence. By this letter Jones may have intended to deceive his associate purchasers or intending purchasers of stock. Draper says he understood that the latter was the purpose. If Jones intended that both himself and his associate purchasers should pay more for the property than it was worth the procedure was folly; if to unload stock on purchasers, it was knavery. There is nothing in the letter or request inconsistent with a belief on the part of Jones that the property would produce and was producing forty barrels daily and that he wanted to show a production above this to secure stock subscribers. If this was the purpose the letter is not here important, for the stockholders are not here complaining. If Jones, know-

1904.]

Wood County.

ing the actual production of the wells, sought to defraud his associate purchasers, his partners, these other questions hereafter referred to will arise.

The foregoing is a rather too extensive statement of the complicated facts and contradictions in this case. The remaining questions are of law arising upon the facts. These are first, as to the double agency; second, as to the fraud.

1. It can not be doubted in Ohio that an agent under certain circumstances may represent both contracting parties in the same transaction. But to relieve such double agent from suspicion that inconsistent duties have been assumed, which *prima facie* will be presumed, it is necessary that it should appear that knowledge of every circumstance connected with his employment by either should be communicated to the other, in so far as the same would naturally affect his action (*Bell v. McConnell*, 37 O. S., 396-402). In this case either the commission was originally fixed at \$6,500 and Jones was mislead at all times as to the amount of it, or else when the broker's work had been all done, when the property was practically purchased by plaintiffs, subject only to the expert approval of Thomas as to the operating condition and production of the lease, the amount of commission is increased from \$3,000 to \$6,500. Not only that, but the basis of the commission instead of being the usage of the business, as Jones was informed, was changed to contract. In any case, such increase of commission and changed in the nature of the claim for it, would be "circumstances naturally affecting the action of the agent." These plaintiffs may have been content for Thomas to receive \$3,000 commission fixed by usage or custom on oil sales, when on the eve of the approval of the property by Thomas, they would be unwilling that he should by contract with defendant have the commission raised to \$6,500. They are entitled under the rule to be informed of the change in the commission arrangement. They were not so informed, and the change in the arrangement, if not concealed, was not disclosed. The failure to disclose was a "fraud in law" upon plaintiffs, and on account of it, upon plaintiffs' election and prompt action, the contract will be declared void (*Meacham's Agency*, Section 798, and cases there cited). Plaintiffs did not know of this change of commis-

sion until this action was brought, and so no claim of want of promptness can be sustained.

2. As to fraudulent misrepresentation, Hendricks admits at one place in his testimony that he misrepresented (p. 112). At one place, a moment later (pp. 113-114), he says that "they asked me what it was doing and I told them I had run two hundred barrel tanks," but did not tell them what it was then doing. This subterfuge can not be allowed. It is perfectly evident that Jones and Wilson wanted to know what the lease was *then* doing; Hendricks knew this and yet he framed his answer so that while true in fact it would be understood by the parties asking the question in a sense in which it was not true.

"No one can evade the force of the impression which he knew another received from his words and conduct and which he meant him to receive, by resorting to the literal meaning of the language used" (*Misner v. Kussell*, 39 Mich., 229).

Again, Draper knew on the same day that both Jones and Wilson were there to ascertain the then production of the lease. This was September 16, 1902. On that day Draper had a statement of the oil run during the whole month of August in his possession. This would show an average daily production of 53 16-100 barrels. He had also a statement of the production for the first half of August. This showed a daily production of 89 barrels. He showed the latter to the parties. They, desiring a whole month's statement, instead of producing the one he had, he ordered another from Lima. Under these circumstances it is manifest that both Jones and Wilson would have the right to conclude that the August runs averaging 53 16-100 barrels was a fair statement of the daily production on September 16th. Yet Draper then knew and Hendricks knew and their employe, the pumper, knew that the average daily runs for the first half of September was only 17 65-100 barrels. Having given this statement for August, it is perfectly evident from all the testimony that Draper proceeded thereafter to operate the lease in a manner in which it would be rendered impossible to know what the entire production of all the wells was. The wells were not all pumped at any one time, nor any of them pumped regularly.

1904.]

Wood County.

It is clear too that Jones and Bowler both believed that the wells would do and were doing more than forty barrels and that Draper knew they believed this, and he was bound to know that from his August statement they believed this.

“Allowing the other party to proceed upon an erroneous belief to which one’s acts have contributed is active concealment tantamount to misrepresentation” (Wald’s Pollock on Cont., p. 515, citing cases).

The facts of the transaction at Wood & Miller’s law office, too, fasten the effect of misrepresentation upon Draper. The admission too by Draper, that he pointed out a plan in the central area where a line of wells could be drilled, seems to us to account for the belief entertained by the parties and known by Draper to be so entertained by them, that that area was then undrilled.

We think that there can be no serious question in this case that Draper made statements of existing matters, in the respects charged, that were material to the transaction and that were false in substance and in fact; that plaintiffs did not know their falsity, but relied upon their truth and thereby sustained damage. The sole remaining question is whether plaintiffs had the right to so rely.

If they did not have such right to rely, it is because (1), having undertaken to make an inspection and examination they were bound to prosecute it to the end; or (2), they were not authorized to rely upon the statements and representations of defendant; but were bound under the circumstances to inspect and investigate for themselves.

Plaintiffs did go to the lease to see the property. The only one of them all who knew anything of the oil business was Wilson. He says he went as agent for Foster, not here a party. Defendant contends that he was agent for both Foster and Lawall. Since, after Wilson’s examination, Foster did not and Lawall did not invest in the property, we are of opinion that Wilson represented Foster alone.

Now, no one could determine by visiting the lease and seeing the wells what the production of the lease with all the wells pumping was, or would be; in other words, what the aggregate

capacity of all the wells then was. The opportunity for an independent investigation was not open to plaintiffs from an inspection on the ground. The furnishing of pipe line statements was within the control of defendant and not within the unaided reach of plaintiffs. From these facts it seems clear that plaintiffs were not compelled to continue an investigation begun, or to begin an investigation, without reference to or any reliance upon the statements of defendant; and this is more particularly the case when, as here, it seems that the opportunity for a full investigation by plaintiffs was interfered with, obstructed and rendered impossible by the active intervention of defendant. It is not to be forgotten that defendant pressed this transaction to a close before all the wells were even equipped, much less pumped, and that the newest well, the "sand well," was not pumped for want of power after defendant had tested it and knew its capacity. (See 18 Am. St., 549; 22 Am. St., 407; 25 Am. St., 611; 30 Am. St., 617; 50 Am. St., 824; 32 N. Y., 275-280; 24 Wis., 81-87; 19 Ind., 130, as to the right to rely upon representations of defendant in the absence of plaintiff's actual knowledge or unobstructed opportunity for investigation.) If an inspection was prevented or its completeness defeated by the acts, arts or words of the seller, the reliance of the purchaser upon the statements of the seller without such investigation or after an incomplete one would be justified (43 Cal., 111; 23 Mich., 99; 31 Mich., 36; 32 Mich., 305; 103 Mass., 501 [as to extent of a patent right]; 1 Bigelow Fraud, p. 532). We have no doubt in this case as to plaintiff's right to rely.

If the letter of October 3, from Jones to Draper is considered as evidence of an intent on the part of Jones to defraud his associate purchasers, then Jones' knowledge, if any, that the capacity of this lease was less than forty barrels is not notice to his partners.

"When one member of a firm is committing or consenting to the commission of fraud upon his co-partners, notice on his part is not notice to them" (*Williamson v. Barbour*, 9 Ch. D., 505; 2 Pom. Eq. Juris., Secs. 674 and 675).

After Thomas entered into the contract or stipulation of November, with Draper, the former's undisclosed information was

not notice to plaintiffs (53 N. Y., 144; 118 Mass., 147; 135 Mass., 499; 139 Mass., 322). Moreover after November 1, at least, the knowledge, as well as the declarations of Thomas as far as this action is concerned, became the knowledge and declarations of *Draper*, for here a special trust and confidence was reposed in Thomas by plaintiffs as Draper well knew (2 Wheat., 178, 195; 6 Ves., 174, 182; 1 Foub. Equity, b—1; c—2, 5, 8). If the said letter of October 3, did not relate to an intended fraud on Jones' partners, then it is not evidence that Jones knew what the lease was producing except that he did not know it was producing nearly one hundred barrels. In the latter case assuming, as we believe that Jones relied upon defendant's statements and so relied upon a production of forty barrels and the other matters stated, all the plaintiffs are entitled each in his own right to maintain this action. If, however, Jones undertook to defraud the other purchasers in the transaction, the result is not different. The cash paid did not belong to Jones in whole or part. Stockholders had paid it relying upon the corporation's ownership of this property, and Draper and Thomas knew this, and on November 8 used the fact to close the transaction. The fund should be restored as against Draper and without regard to whether Jones had wrongfully assisted to place it in Draper's hands. The notes signed are executory contracts, and Jones could plead his own fraud known to Draper as a defense to them on suit brought against him by Draper. *In pari delicto, melior est conditio possidentis*. So even as against Jones, Draper would have no right to retain the money or enforce the notes, if Bowler and Lawall, or either, were sought to be defrauded by Jones. True by the cancellation of the notes in such case Jones may escape liability. "But equity will not refuse to aid his innocent co-purchasers because of a fraud committed upon them by him. If their rights can not be secured without to some extent releasing him, the innocent must not suffer" (40 O. S., 190-203). The substantive facts warrant full relief to plaintiffs and there is nothing in the procedure in the action to prevent it.

The contract of purchase is decreed to be null and void; the conveyance is rescinded; the money paid, with interest at six per cent. from the date of payment, is ordered to be restored to

plaintiffs; the notes described in the petition are ordered to be surrendered up and canceled, and an account is ordered to be taken of the money expended by plaintiffs in putting the lease in a condition necessary to operate, and for the amount so expended *in full*, together with money expended by plaintiffs in *improvements* on the lease in so far as said *improvements increases the value of the lease* as determined on the account to be taken, plaintiffs are decreed to have a lien upon said leases and property. The part of the purchase price paid in cash, together with interest thereon, is also declared to be a lien upon the property. Costs are adjudged against defendant and execution awarded. If possible, parties may agree upon the master to take and state the account; or if not, the court will appoint.

Phelps & David, for plaintiffs in error.

James O. Troup and Beverstock & Donehay, for defendant in error.

CONTRIBUTORY NEGLIGENCE IN DISREGARDING ORDERS.

[Circuit Court of Lucas County.]

THE WHEELING & LAKE ERIE RAILROAD COMPANY v. HATTIE I. FISHER, ADMINISTRATRIX.

Decided, March 10, 1904.

Negligence—Railways—Locomotive Engineer Killed by Accident Which Could Have Been Avoided—By Obeying Orders on His Part—Or by Prevention by the Company of Obstruction Falling Upon the Track.

A locomotive engineer who had been ordered to "look out for rocks falling in cuts east and west of Rockford," was killed by his engine striking a rock in one of these cuts, while running twenty miles an hour. *Held*: That recovery on the part of the widow is precluded by the contributory negligence of the engineer in not keeping his train under complete control on that part of the road specified in the order.

HAYNES, J. (orally); PARKER, J., and HULL, J., concur.

A petition in error was filed in this court to reverse the judgment of the court of common pleas. The action was brought

1904.]

Lucas County.

by Hattie I. Fisher, administratrix, against the railroad company for the purpose of recovering damages from the railroad company occasioned by the death of her husband, which it is averred was caused by the negligence of the defendant company. Such proceedings were had in that case as that a verdict was rendered by the jury for the plaintiff in the sum of \$7,500, and a judgment was entered upon that verdict. And this petition in error is prosecuted for the purpose of reversing that judgment and to set aside that verdict.

The accident occurred at a place called Rock Point, in the southeastern part of the state, and about three or four hours run this side of Wheeling. An outline of the facts is: In that part of the state the country is broken and rolling, and at various places there are cuts through which the railroad passes, the last one in that section being this Rock Point, as it is called. In the immediate neighborhood of this point the last station is a place called Rockford, which was about four miles from the Rock Point, and the road from there runs along to a point about a mile and three-quarters east of Rock Point, where you arrive at a place called the Summit Point, making it up grade the most of the time to that point, and from there it was for some distance down grade, the next station being two or three miles beyond Rock Point. From this summit down to Rock Point there is a drop of 70 feet in the grade.

The decedent had left Wheeling with a freight train on April 4th, 1901, at 5:35 in the evening, or afternoon. He arrived at Rock Point at about 9:35 in the evening. He had stopped at Rockford about a half an hour, waiting for a passenger train to pass to the eastward, and after it had passed this train started for the next station. When he reached the summit and as he came over the summit and the train was partly across the summit, he shut off the steam and from that point the train run by its own weight. When he arrived at this point the train struck a falling rock about six feet long by three feet wide and three feet thick. The locomotive passed over the rock and passed on 150 or 200 feet along the ties, being thrown off the rails, where it turned over and the engineer, H. H. Fisher, was killed. The fireman who was in the cab with him had the

good fortune to escape with scarcely an injury, although he went over in the locomotive with the engineer.

This Rock Point is the point of a hill, and this cut that I speak of is a cut through that point. The point itself, when you come to the center of the point, is said to be from 35 to 50 feet high and 150 to 200 feet wide—that is, the point itself—the cut, however, is from 600 to 900 feet long and is on a curve—the road curves around this point. The point is cut away, not perpendicular perhaps—it is cut off at the base and comes near the railroad track; at the top it extends back. It is formed of gravel and rock, some loose earth and rock and sand and stone under, and during the wet season or during the time the frost is coming out of the ground in the spring, pieces of rock and gravel work loose, become detached and fall upon the track, and this is known to occur from time to time. The railroad company at times had employed a watchman, or rather the foreman of the section gang had been in the habit from time to time to send a man out as a watchman at this point, when he thought there was serious danger of rock falling. This, however, was not a fixed habit, but was done from time to time according to the judgment, evidently, of the section foreman. On this particular night in question there was no watchman sent out.

It is contended in the petition that the railroad company was guilty of negligence contributing to the death of the engineer, in that it had failed to send out a watchman to watch along the track at this time, knowing, or having reason to know that there was danger of rock falling at that point.

Conceding now that the jury would be fully warranted in finding that the railroad company was guilty of negligence in not sending out a watchman at that time, having no watchman there, the controversy in the case has turned upon the fact as to whether or not the engineer himself was not guilty of contributory negligence in causing this disaster; whether he was not, in fact, the real cause, the real active person in the matter of negligence in respect to the accident.

The railroad company—while this foreman did sometimes send a man out there—did not rely upon the fact that a watchman might be sent out, perhaps did not place a great deal of reli-

1904.]

Lucas County.

ance upon it; but whether they did or not, they did from time to time send out telegrams and dispatches to their conductors and engineers in regard to their duty in the matter; and on the morning of this day they had sent from the office of the assistant superintendent at Toledo, an order directed to the engineers and conductors on the road, which had been delivered to the engineer and conductor of this train, a telegram which read as follows:

“Reduce speed to five miles an hour through the cut east of Valley Junction.”

Now Valley Junction was thirty-six miles west of this point. The company had been carrying forward some work there either of repair or improvement of the road and the tracks were said to be in a very unsafe condition; and that part of the telegram related to the passage of trains on that side of Valley Junction. It then continues:

“And look out for rocks falling in cuts east and west of Rockford.”

Now Rockford is the station I have spoken of about four miles from this point, and there were cuts, as I have said, east of that point and also this cut west of it.

Now this engineer had this order in his pocket. He had his train composed of forty-five cars; they were all loaded, some with steel bars, some with coal, some with merchandise, and perhaps some other things—they were loaded to their full capacity and weighed perhaps, if I remember right, an aggregate of 1,530 tons. The train had in it thirty of those cars, equipped in the most perfect manner with air brakes. And it is said by experts that fifteen air brakes would have been sufficient to handle that train. With thirty of those he had full and complete power to control his train; he had a good engine; it was a well equipped train—it had some fancy name which I have forgotten.

Some question is raised here in regard to the construction of this telegram, this order, what the engineer should understand by it, what should be its meaning, and considerable testimony

has been taken by the parties, of experts, engineers and others, in regard to the meaning of a telegram of this kind, what the engineer should understand it to mean. The testimony on behalf of the railroad company and perhaps some of the testimony on behalf of the plaintiff is that it means that he is to keep a lookout for rocks and keep control of his train, so that he can stop it upon seeing a rock within the line of his vision.

Well, to an ordinary person, there should be no question as to the fair construction of that telegram—he shall look out for falling rock; he must look to see if any have fallen, keep watch in front of him; it is notice to him that these rocks are likely to fall upon the line of his tracks; that he is to look out for them and avoid them. In order to do that he must keep his train under such control that he can stop the train within his range of vision, if necessary.

Now that was a step that had been taken by the company for the protection of its train and engineer. The engineer at all times between stations had control of the engine and the running of the train; it was he who said how fast it should run or how slow it should run. It was his duty to control the running of the train between stations.

As I have said, in passing over the summit a mile and three-quarters away, the train was not going very fast; it was going up grade. It started on down the grade to this point, and as I have said there was in that mile and three-quarters a drop of seventy feet. This was a heavy train. The fireman says that the train had a speed of at least twenty miles an hour, and in that he is supported by the others of the crew, the conductor and brakeman. The fireman says the engineer took his position in the cab on the seat, with a window back of him closed; it was a little cold. As they come over the summit he had the window shut that was at his right hand side. There was a window in front of him, of course; he sat there with his arms folded until after they were at the point of the rock in this cut; they had passed nearly through it—got nearly past this point, perhaps nearly at this main point, Rock Point, when the fireman looking out of his window on his side—being on the left hand side, inside of the curve, passing around the curve, and discovered this

1904.]

Lucas County.

rock lying across the track, at a distance perhaps of 100 feet ahead of him, as he judged. He shouted to the engineer that there was a rock on the track. The engineer then jumped and pulled at the throttle—set his air brake—and about that time they were on the rock. The engine, as I have said, was overturned, and the cars, some fifteen or sixteen of them, were piled up to a height of a great many feet, one on top of the other; and a great deal of damage was done to the train.

Now the question that is argued here, as I have said, is whether this engineer was guilty of negligence, such negligence as precludes a recovery. It is claimed upon the part of the defendant in error that he had a right to rely upon the fact that there should be a watchman there. It must be noted that while he was running on this line back and forth, that these watchmen are only there from time to time, not a steady fixed practice. And that he, when he come over that point, would not know whether there was in fact a watchman there or not. We do not consider that as very material. This engineer was placed in a position of responsibility; he was placed in charge of the engine upon this train, and placed in control of the train itself and the rate of speed at which it should run, at least between stations. His duty to his company was to obey its orders; and if the company, in the performance of this duty for the operation of its property, said to him by an order that he should look out for falling rocks, it was an order to him to so run his train and take such care that he would not injure, by any act of his, at least, the train that was in his charge. He had but one thing to do and that was to obey that order; and he could only obey it by operating his train at such a rate of speed as that he could stop it within a very short distance. It is said by some it should be down to between five and six miles an hour. He had the power to do this; the power in his hands to stop that train at any point he chose between stations. But from all the evidence it seems that instead of taking such steps he sat down and allowed his train to proceed in the ordinary manner at such a rate of speed as it would obtain by its own weight, in going down a grade with this fall in it. And in doing that we think he was guilty of negligence, disobedience of orders; and that it was

due to that disobedience of orders, apparently, that this accident occurred. Upon the facts of this case if he had been running his train as he should have run it, he would have been able to stop the train before it reached the rock; and would have preserved his own life and the property of the railway company. It is a case, if you please, where there was negligence of both parties—negligence may be assumed of the railway company, and negligence of the engineer. He had been cautioned by his conductor before that time that he had been running down that cut too fast, but he did not seem to have noticed that.

We think upon the clear rules of law, where the facts are as we have stated them, the plaintiff here is precluded from recovering for the death of her husband. It is a case where death was caused by his own negligence, and he could not recover if he were only injured and sued the company; so she can not recover.

With this view of the case, the judgment of the court of common pleas is reversed, the verdict set aside and the case remanded for a new trial.

C. A. Seiders, for plaintiff in error.

Kohn & Northup, for defendant in error.

**THE ACT REGULATING APPOINTMENT OF CONDUCTORS,
ETC., UNCONSTITUTIONAL.**

[Circuit Court of Franklin County.]

THE C., C., C. & St. L. RAILWAY CO. v. STATE OF OHIO.*

Decided, 1903.

Constitutional Law—Requirements of Section 3365-11 as to Conductors, Engineers and Flagmen—Inequalities of—The Act Unconstitutional.

The act of January 31, 1893, regulating the appointment of conductors, engineers and flagmen on certain steam railroads of the state, is unconstitutional in that it creates favored classes, prescribes no standard or test of efficiency, arbitrarily says who may labor at a given employment and who may not, fails to provide for the safety of the public, and unequally affects property not differing in kind or use.

*Affirmed by the Supreme Court, without report.

1904.]

Franklin County.

WILSON, J.; SUMMERS, J., and SULLIVAN, J., concur.

Heard on error.

This proceeding questions the constitutionality of the act passed January 31, 1893 (90 O. L., 20), regulating the appointment of conductors, engineers and flagmen on certain steam railroads in the state.

The action below was one to recover the stipulated penalty for a violation of the statute, the defendant company having employed a person as conductor not in the class prescribed by its terms.

A demurrer was interposed to the answer, admitting the employment, but filed for the purpose of pleading the facts in the case, so as to make appear with more particularity the inequalities and unreasonableness of the statute. This demurrer was sustained and the plaintiff had judgment, thus raising the question. Since the cause was submitted in this court, the Supreme Court has handed down an opinion in the case of *Harmon v. The State*, 66 O. S., 249, which is decisive of the question here, and renders unnecessary any extended review of the authorities or discussion of the subject. The case referred to was a suit to test the constitutionality of the act of March 1, 1900 (94 O. L., 33), regulating the appointment of stationary engineers. The act provided among other things as follows:

“Sec. 7. Any engineer who has been employed continuously as a steam engineer in the state of Ohio for a period of three years next prior to the passage of this act, and who files with his application a certificate of such fact under oath, accompanied by a certificate from his employer or employers verifying the same, or who holds a license issued to him under any ordinance of a municipal corporation of this state, shall be entitled to a license without further examination.”

Of this the Supreme Court says, page 254:

“It is arbitrarily forming a favored class, and is in conflict with Section II of the Bill of Rights which guarantees equal protection and benefit; and it is also in conflict with the purpose for which the Constitution was established, which was to promote our common welfare. This section of the act promotes the welfare of a particular three-year class instead of the common welfare of all.”

The act under review in the case at bar provides among other things:

“It shall be unlawful * * * to employ any person in the capacity of conductor of a passenger train or trains unless such person has had at least two years’ experience in the position of conductor of either passenger, freight or construction train within six years next preceding the time of such employment. * * * But nothing in this act shall be so construed as to prevent any such railroad company or corporation from retaining conductors in its employ at the time of the passage of this act.”

That is to say, a person who has been a conductor of passenger, freight or construction train for two years within the last six before the employment may be employed without examination as to his competency; but a person so employed for a term one day less than two years, shall not be employed, however skillful and competent he may be; and a person who has been in the employ of the company for one day previous to the passage of the act may be retained however incompetent and inexperienced he may be. The act creates arbitrarily two favored classes: Those who have had two years’ experience in the last six before employment, and those who happened to be in the employ of the company at the time of the passage of the act. Similar and even more glaring inequalities might be pointed out governing the employment of engineers, and others. The act prescribes no standard, and no test of efficiency; arbitrarily says who may labor at a given employment, and who may not, and fails to provide for the safety of the public, which must have been the purpose of any lawful exercise of the police power of the state.

So, too, the limitation of the act to “any railroad company or companies running or operating a steam railroad in the state of Ohio, thirty miles in length or more, and the same having been operated for three years or more” is a discrimination without reason, affecting unequally property not differing in kind or use, as well as employes in the same class of service. The act must be held unconstitutional. The judgment of the court of common pleas is reversed, the demurrer overruled as to the answer, sustained to the petition, and the petition dismissed.

1904.]

Lucas County.

SALE OF TAXES—*LIS PENDENS*.

[Circuit Court of Lucas County.]

THE SECURITY TRUST COMPANY v. C. W. ROOT.

Decided, October 31, 1903.

Lis Pendens—Doctrine of, Not Applicable—As Against Proceedings Under a Tax Sale—Paramount Interests of the State.

1. The lien of taxes on land in favor of the state, and the right of the state to proceed in the collection thereof in the mode provided by law, are paramount to the ownership or interests of private parties, and are not affected by the circumstance that a suit may be pending to foreclose and extinguish the title of the owner.
2. The doctrine of *lis pendens* does not apply to one who obtains an interest in the subject matter of the suit through one having a title or lien superior to that asserted in the suit relied upon as a *lis pendens*, that is not attacked in such suit, and the owner of which is not a party to such suit; *lis pendens*, therefore, does not apply to one acquiring an interest or lien at a tax sale.

PARKER, J.; HULL, J., and HAYNES, J., concur.

In the court below a general demurrer to the petition was sustained, and plaintiff not desiring to plead further, a judgment was entered against him, and he prosecutes error to this court, so that the question is presented here, whether the petition contains facts sufficient to constitute a cause of action in favor of plaintiff against defendant.

Plaintiff sets forth in its petition that it is the owner of the westerly thirty-eight feet of lot 10, Machen's first addition to the city of Toledo. It then sets out in detail how it came to be the owner of these premises. The history of the matter, in brief, is that at one time it had a mortgage upon the premises; that it foreclosed the mortgage, bid the premises in at foreclosure sale, which was confirmed and a deed made. Then it sets forth that pending these proceedings in foreclosure the premises were sold for taxes at a delinquent sale to the defendant, Root; that Root acquired a certificate such as is provided by law showing that he was the purchaser at this tax sale; that Root claims

to have a lien on the premises by virtue of the proceedings under the tax sale. But the plaintiff says that Root having purchased pending these foreclosure proceedings, he took subject to the doctrine of *lis pendens* and acquired no interest that can be asserted against plaintiff's title.

In a case reported in the 20 Ohio Circuit Reports, at page 649 (*State, ex rel Mortgage & Trust Co., v. William M. Godfrey, Auditor*), we had a similar state of facts under consideration. The real question there was as to the duty of the auditor to make a transfer upon the books, the question arising between one who had purchased the premises at foreclosure sale and one who had acquired a tax title. Our decision there was reversed by the Supreme Court in 63 Ohio St. We had occasion to discuss the question arising in this case, and in the course of the opinion this was said:

"The lien of taxes on land, in favor of the state, and the right of the state to proceed to the collection thereof, in the mode provided by law, are paramount to the ownership or interests of private parties, and are not affected by the circumstance that a suit may be pending to foreclose and extinguish the title of the owner. It is not necessary or proper to make officers, upon whom the duty devolves to collect these revenues, or the state, or political bodies to which these revenues go, parties defendant to the action. The government and its officers are not to be hindered, delayed or obstructed in proceeding according to law to collect taxes for the support of the government, by the litigation of private persons with respect to rights and interests subordinate to the claims of the state.

"To hold otherwise would be to read into the tax laws important conditions and limitations not appearing there and would be wholly unauthorized. Such provisions would make it easy for fictitious or long drawn out litigation to defeat the evident and proper policy of the state; that is, to make prompt collection of its revenues. That this is not permissible and wholly obnoxious to the policy of the law, is evident from many of the provisions of the tax laws and from their general scope and obvious policy. The rights of a purchaser at a tax sale under circumstances like those set forth here, are not affected by the foreclosure of the mortgage. We think that is a necessary conclusion to be drawn from the holding in *Ketcham v. Fitch, supra*. As to such purchases the rules of *lis pendens* do not

apply, and to his lien or title acquired from the state the effects of *lis pendens* do not attach."

The case of *Ketcham v. Fitch* is reported in 13 O. S., 201. We still adhere to the views there expressed and just quoted, which views we believe are not antagonized by the reversal of the judgment by the Supreme Court. Counsel for plaintiff in error insist that we did not upon that occasion give consideration to the provisions of Section 5055, Revised Statutes, upon the subject of *lis pendens*. That section reads:

"When the summons has been served, or the publication made, the action is pending so as to charge third persons with notice of its pendency; and while pending no interest can be acquired by third persons in the subject matter thereof, as against the plaintiff's title."

But the doctrine of *lis pendens* does not apply to one who obtains an interest in the subject matter of the suit through one having a title or lien superior to that asserted in the suit relied upon as a *lis pendens*, that is not attacked in such suit and the owner of which is not a party to the suit; therefore the doctrine of *lis pendens* does not apply to one acquiring an interest or lien at a tax sale. And this principle receives illustration in the case of *Porter v. Barclay et al*, 18 O. S., 547. Counsel for plaintiff in error also cites in support of his contention the case of *Crum, Treasurer, v. Cotting*, 22 Iowa, 411. The fourth proposition of the syllabus reads:

"A purchaser of real estate at a tax sale made after the commencement of an action and the filing of a petition to foreclose a mortgage on such estate in favor of the university fund, acquires no interest in the premises as against such mortgagees which would not be cut off or bound by the decree in favor of said fund."

But that authority is not in point here and should have no influence upon our decision for the reason that that decision was compelled by a statute of the state of Iowa, providing:

"Section 811. That in all cases where real estate is mortgaged or otherwise incumbered to the school or university fund of this

state, the interest of the person who holds the fee title shall alone be sold for taxes, and in no case shall the interest or lien of the state be affected by any sale of such incumbered real estate made for taxes,"

making the claim for taxes subordinate to the claim or interest of the state under a mortgage to the school or university founded by the state.

On the other hand, counsel for defendants in error have cited a number of cases in support of the contention that the purchaser at a tax sale is not affected by the *lis pendens* decisions of courts of other states, but we have not deemed it necessary (being so fully convinced upon this point) to examine those cases. I will, however, mention them that they may go into this report, viz.: *Wright v. Walker*, 30 Ark., 44; *Baykin v. Jones*, 67 Ark., 547; *Irving v. Cunningham*, 77 Cal., 52; *Wilson v. Bank*, 121 Cal., 630; *Barrelle v. Delassus*, 16 La. An., 280; *Flower v. Beasley*, 52 La. An., 280; *Becker v. Howard*, 4 Hun. (N. Y.), 359; last case affirmed, 66 N. Y., 5.

The judgment of the common pleas court in this case will be affirmed.

Birchard A. Hayes, for plaintiff in error.

John C. Munger, for defendant in error.

1904.]

Lucas County.

DEFAULTED PREMIUMS ON LIFE INSURANCE.

[Circuit Court of Lucas County.]

**METROPOLITAN LIFE INSURANCE CO. v. FLORENCE A. WALTON,
ADMINISTRATRIX.**

Decided, March 10, 1904.

Life Insurance—Incontestability of Policy after Two Years—Except for Fraud or Misstatement of Age—Relates only to What Occurred at the Inception of the Contract—Waiver of Default in Payment of Premiums.

1. The provision endorsed upon a policy of life insurance that "this policy shall be incontestable after two years, except for fraud or misstatement of age," is similar to the provision in Section 3626, Revised Statutes, and relates entirely to what occurred at the time the policy was issued or the application made, and has no reference to default in the payment of premiums.
2. Where the policy contains the provision that "should this policy become void in consequence of non-payment of premiums, it may be revived if not more than fifty-two premiums are due, upon the payment of all arrears, and the presentation of evidence satisfactory to the company of the sound health of the insured," the company may rightfully refuse to accept four weeks premiums on a policy forty-six days in arrears, an investigation having shown that the insured was far gone with consumption, his death having occurred seventeen days thereafter.

HULL, J.; PARKER, J., and HAYNES, J., concur.

This action was brought in the court of common pleas by the defendant in error, who was the plaintiff below, upon a policy of life insurance issued by the insurance company, upon her husband's life, for the sum of \$500. The dues upon this policy were sixty-two cents every Monday. Payment was refused by the insurance company upon the ground that the premiums were in default at the time of the death of Mr. Walton. Suit was brought to collect the amount of the policy. The case was tried to the court and jury and a verdict returned for the amount of the policy, with interest, and judgment was entered thereon.

It is sought by this proceeding in error to reverse that judgment.

It is conceded that at the time of the death of Walton the policy was in default for the payment of dues or premiums; but is claimed that the company had waived the payment of the premiums upon the exact day that they were due. The policy contained a provision, in substance, that if the premiums were not paid when due, that the policy should be void, and following that, this was also in the policy:

“And it is agreed that the foregoing provision which avoids the policy in case any premium shall be overdue, shall be considered in no respect waived by any act of grace by the company in acceptance of overdue premiums upon this or any other policy.”

There is a further provision on the face of the policy that agents are forbidden from receiving premiums more than four weeks after they are due. This provision is to be considered with another provision of the policy which is endorsed on the policy, to which I will refer later.

On the back of the policy under the head of “Privileges and Concessions to Policy Holders,” among other things are these provisions:

“*Incontestability*—This policy shall be incontestable after two years, except for fraud or misstatement of age.”

“*Grace period*.—Should the death of the insured occur while any premiums are in arrears not exceeding four weeks, the company will, nevertheless, pay the policy, subject to its conditions.”

“*Revival*—Should this policy become void in consequence of non-payment of premium, it may be revived, if not more than fifty-two premiums are due, upon the payment of all arrears, and the presentation of evidence, satisfactory to the company, of the sound health of the insured.”

The policy was taken out in June, 1899. Walton died June 9, 1902—about three years after the policy was issued. During that time the insurance was paid a portion of the time by Walton's wife, and a portion of the time by him. For about a year at the last, whatever premiums were paid were paid by Mrs. Walton. They were in arrears for premiums several times. Sometimes premiums were due more than four weeks, which was called the grace period; they ran over this time a few days occasionally,

1904.]

Lucas County.

and the money was accepted and the policy revived, not more than fifty-two weeks having gone by. On May 23, 1902, the premiums were in arrears forty-six days, six Mondays having gone by, and some days over, and Mrs. Walton tendered to the agent the premium for four weeks; this left three weeks still unpaid, but within the grace period, as it is called; these premiums were refused by the agent; and on the ninth of June following, Mr. Walton died. The question submitted to the jury was whether there had been such acts on the part of the company as would lead a reasonably prudent person to believe that the company had waived the requirement that premiums should be paid on the Monday of each week. And a verdict was returned in favor of the plaintiff.

It is claimed that the judgment is wrong. It appears from the evidence that in April before Mr. Walton's death, Mrs. Walton went to the office of the company and told the young man in charge that she could not afford to pay these premiums any longer; that they could see Mr. Walton and ascertain whether he would pay them (the insurance was on his life for her benefit); they were not living together, but had been separated for about a year. He was keeping a saloon or tending bar in another part of the city. The next month, May 23, she had not paid anything more, and being in arrears at the time the talk occurred at the office in April, she tendered to the company four weeks' premiums. Before accepting these premiums the agent undertook to ascertain the health of Mr. Walton; he went to the saloon where he was employed, and there found him in a bad state of health, suffering from consumption or some pulmonary disease, breathing very hard, so hard that he could be heard across the room. He reported that fact and the company refused to accept the premiums the day after Mrs. Walton had made the tender on May 23. Two or three days after that Mr. Walton was taken to the hospital and on June 9, seventeen days after the tender was made, he died. The question is, whether under these circumstances the company is liable upon this policy.

It is said that this policy, having run more than two years, there were only two grounds upon which it could be contested,

according to this provision endorsed upon it and which I have read:

“This policy shall be incontestable after two years, except for fraud or misstatement of age.”

In our judgment that provision relates entirely to what may have occurred at the time of the issue of the policy or the application, at the very inception of the contract, and does not relate to non-payment of premiums; and does not mean that no matter if at the time of death the insured is in default for payment of premiums in any amount or for any length of time, the policy shall be paid. It is similar to the provision contained in Section 3626, Revised Statutes, of this state, which provides:

“All companies, after having received three annual premiums on any policy issued on the life of any person in this state, are estopped from defending, upon any other ground than fraud, against any claim arising upon such policy by reason of any errors, omissions or misstatements of the assured in any application made by such assured on which the policy was issued, except as to age.”

We do not think that this provision of the policy refers to or was intended to refer to the matter of payment of premiums that were overdue “after two years.” If this were true, one might fail and refuse to pay after that period for a year or two years, or for an indefinite time, and his policy could not be contested or payment refused upon that ground. This would be unreasonable. The payment of dues lies at the very foundation of life insurance. Without their being paid with reasonable promptness, no insurance company can do business.

But it is said that the company waived the payment of these dues upon the Monday of each week, and there is evidence tending to show this, as premiums were received on several occasions, not only after they became due, but after the grace period of four weeks had gone by.

There is, however, a provision which I have read on the back of this policy that in case the policy is revived it must be upon the payment of arrears and the presentation of evidence satisfactory to the company of the sound health of the insured. The

1904.]

Lucas County.

policy upon its face provides, "if any premium shall not be paid when due, this policy shall become void;" but on its back is the provision that if the insured dies within four weeks after he is in default for dues, the policy shall be regarded as in full force; and the further provision:

"Should this policy become void in consequence of non-payment of premiums, it may be revived, if not more than fifty-two premiums are due."

That clause, a part of which I have just read, contains the condition referred to:

"Upon the payment of arrears and the presentation of evidence satisfactory to the company of sound health of the insured."

There is no evidence in this record that the company or any of its agents at any time waived the provision that if the policy was revived, the company must have satisfactory evidence of the sound health of the insured. Mrs. Walton says herself that they always asked her what his health was; how he was, or whether he was well, and so on, when she paid up the back dues and thus revived the policy. So it can not be said that the company, by any of its acts, or the acts of any of its agents, had ever waived this provision of the policy. That was part of the contract and one of the conditions upon which the policy could be revived, that such evidence be presented to the company. This seems to us to be a very reasonable provision that when one is in default for non-payment of premium for a period not exceeding fifty-two weeks, his policy, which has become void, can not be revived, unless he is in reasonably good health, and this is shown by satisfactory evidence to the company.

Now what were the circumstances at the time this tender was made? I have already stated them briefly. Before the money was received the agent undertook to satisfy himself as to the health of Mr. Walton. Mrs. Walton had theretofore notified the company that she could no longer pay these premiums; and apparently on learning (that would be the inference) that Mr. Walton was in very poor health, she made this tender to the

company. The agent visited Mr. Walton and ascertained that he was in very poor health, and within seventeen days after that he died. This provision not having been waived by the company upon any occasion, we are of the opinion that the company was not bound to receive the dues under these circumstances, with Mr. Walton in the condition of health that he was. Any person insured in this company, who allowed his dues to go by the day of payment, took his chances of getting into such condition of health that the company would not permit him to revive his policy, there being no evidence that the company had ever waived this provision as to the health of the insured. We are of the opinion that this verdict is not sustained by the evidence; but that the uncontradicted evidence shows that the policy had become void at the time the tender was made, and the undisputed evidence is that Mr. Walton was in such condition of health at the time that the company was under no obligations to accept the premiums or revive the policy.

In view of this, a judgment should be entered here in favor of the company; we see no reason for sending the case back for a retrial, the undisputed evidence showing that this provision as to health had never been waived, and showing further that Mr. Walton at the time the dues were tendered was practically in a dying condition, and did die within a very short time thereafter. In our opinion the company is entitled to a judgment upon this record and that will be the order of the court.

The judgment of the court of common pleas will be reversed and judgment entered in favor of the plaintiff in error.

George B. Boone, for plaintiff in error.

O. S. Brumback and *A. T. Goorley*, for defendant in error.

1904.]

Hamilton County.

TESTIMONY IN WILL CASES.

[Circuit Court of Hamilton County.]

ROSA RAPP ET AL V. MAGDALENA BECKER ET AL.

Decided, April 5, 1904.

Wills—Testimony in Suits to Set Aside—Not the Attempt but the Effect of Attempts to Unduly Influence that Determines—Province of the Court and of the Jury—Charge of the Court—Examination of Juror on Voir Dire.

1. The statement in the charge to the jury in a suit to contest a will, that "the important item of evidence bearing upon the condition of mind of the testator is the will itself," is erroneous, in that the court invaded the province of the jury by inviting a substituting of its opinion for that of the jury as to what item of evidence should be regarded as of special importance.
2. It is not the effort or attempt to coerce a testator as to the will he shall make, but the effect which such attempt or threats had upon him, that determines whether or not he was unduly influenced in the making of the will.
3. Where the court delivers both a correct and an incorrect charge with reference to the same matter, and it can not be determined which instruction the jury followed, it will be regarded as prejudicial error.
4. The admission in evidence of a statement, not made in the presence of the testator or otherwise communicated to him, is not prejudicial, notwithstanding the irrelevancy and immateriality of such matter.
5. But to admit testimony having no tendency to establish undue influence and which related to events occurring after the execution of the will, is error.
6. The principle that what the testator never knew could not have influenced him and should not be admitted in evidence, is not literally true, for the reason that he may have been influenced by conditions the cause of which was unknown to him, and a purpose of influencing would be all the more effective if concealed.
7. A juror is not guilty of misconduct because of a misunderstanding between counsel and himself as to his connection with a previous

case, where the statement which he made was not intentionally wrong, but was due to the mode of inquiry adopted by counsel.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

The original action was brought to set aside the will of Frank Rapp, deceased, on the ground of mental incapacity and undue influence.

The evidence was insufficient to sustain the verdict setting aside the will upon the ground that the testator was of unsound mind and could only be sustained upon the ground that the beneficiary, Rosa Rapp, exerted undue influence over the testator at the time of the execution of the will. The testimony of the plaintiffs tends to show that the testator through the efforts of Rosa Rapp was estranged from his other sisters, although the only evidence that it was operative at the time of the execution of the will was the want of any provision for the other sisters by the will itself. We are unwilling, however, to reverse the judgment upon this ground.

It is claimed by the plaintiffs in error that the court erred in giving certain special charges at the request of the defendants in error:

“If the jury find that Frank Rapp was at the time of the making of his will in a morbid condition of mind, so that his brain was affected by disease, crazed by stimulants or other causes so as to lead him to do things which at other times he would not have thought of doing, in the eye of the law his feelings, desires and acts at such time are not considered to be the feelings, desires and acts of the man, and a will made by him under such influences and conditions of mind would not be his will, if such influences affected his mind to such extent that he was unable to understand and appreciate his relations to and obligations to his relatives and the persons who would be the natural objects of his bounty in making his will.”

Counsel claim that the word “obligations” in this charge means *legal obligations* to his relatives, but it is not so expressed, and taken in connection with the special charges given at the request of the defendants below it clearly appears that the court

1904.]

Hamilton County.

was referring to the moral obligations or duty of the testator to his relatives.

The court also charged the jury as follows:

“In cases like the one at bar, the important item of evidence bearing upon the condition of the mind of the testator is the *will itself* and although the fact that a will is unjust, or wrong, or absurd, does not of itself prove the incapacity of the testator to make a will or that it was made by him under undue influence, yet it is an item of evidence for the jury to consider as bearing upon the question and it is for the jury to determine what weight shall be given it.”

The objection to this charge is that it gives undue prominence to the single item of evidence, to-wit, *the will*. It is true that the court adds that it is for the jury to determine what weight shall be given to it, but by designating it as an important item and in calling the jury's especial attention to such item, the court invades the province of the jury by inviting a substitution of its opinion for that of the jury. We think, therefore, that there was error in giving the charge.

The following charge was also given:

“In order to constitute undue influence in the making of a will it is not required that any physical force should be used, but any restraints or threats or influence brought to bear upon the testator, or persistent importunities which he has not the strength to resist, if exerted upon him to coerce him into making a will or any of its provisions, is undue influence within the meaning of the law. And it matters not how small or great the influence may be so long as it destroys the free agency of the testator.”

The clause in this charge “if exerted upon him to coerce him into making a will” is equivalent to saying, if exerted for that purpose it would constitute *undue influence*, but it is not the effort or attempt to coerce, but it is the effect the restraint or threats have upon the testator that constitutes undue influence.

The purpose to coerce may be ever so clear and certain, yet if the restraint or threats fail to control or affect the testator there

can be no undue influence. It appears that the court gave a correct charge on this subject at the request of the plaintiffs in error, but it can not now be determined which charge the jury pellee.

followed, hence we think it was error prejudicial to the plaintiffs in error.

The next alleged error is the admission in evidence of the declaration of Rosa Rapp, at page 55 of the bill of exceptions, where, in speaking of the testator associating with Carrie Heckle, she said:

“That she didn’t think that she was a girl for Frank to go with. Frank ought to get somebody his kind that had money like he did.”

This was said not in the presence of the testator nor was it otherwise communicated to him. We think it is therefore irrelevant and immaterial but not prejudicial.

The next alleged error is the admission of the declaration of Rosa Rapp, page 158 of the bill of exceptions, as follows:

“Rosa told me that Jacob had \$1,500, and Frank \$500 in the business.”

Jacob and Frank had been partners in the business and upon the death of Jacob, Frank had treated the partnership as though they were equal partners. This declaration was not competent to prove the amount that each partner had put in the business, nor was it competent as an admission against interest, it having been made during the lifetime of Jacob when Rosa had no interest under the will of Frank Rapp.

The declaration of Rosa Rapp, page 262, made to her sister, Frida Distel, when she signed a paper releasing to her father and mother her interest in the estate of her deceased brother, Jacob, was irrelevant and immaterial, but not prejudicial.

The account given by Mary Dotzauer, of the action of the mother when it was claimed she was pursued by Rosa Rapp, tended to prove misconduct of Rosa Rapp and undue influence over her mother, but it has no tendency to prove undue influ-

ence over the testator, especially as it occurred after the execution of the will. It was, therefore, error in admitting it as evidence.

Counsels for plaintiffs in error state the following rule:

“What the testator never knew could not have influenced him, and should not have been admitted in evidence.”

This is not literally true, because certain conditions, the cause of which was unknown to the testator, might have influenced him in the execution of the will. If Rosa Rapp created such conditions, and they influenced the testator, she is responsible therefore, although he may have been entirely ignorant of her agency. If she entertained any purpose of influencing the testator, it would be all the more effective if her connection with it was concealed.

The evidence tending to show that Frank Rapp was not an equal partner with his brother Jacob, and that therefore he obtained money which properly belonged to the estate of Jacob Rapp was admissible to show the source of that part of Frank Rapp's estate, and as to which there was an additional obligation to his sisters.

It is further claimed that there was misconduct on the part of one of the jurors when examined, touching his qualifications as juror, it being claimed that he answered “No” to a question whether he had been a party to a suit involving the contest of a will, when in fact he was such party. The following examination occurred:

“Have you ever been parties to any proceeding in which a will has been contested? You have, Mr. Thornton? Will you kindly tell us what the nature of it was?”

Mr. Thornton—“Well, it was Kirby against Kirby.

Q. You were a witness in the case?

A. No, I was not a witness. I was connected with it.

Q. You simply had some relationship to some of the parties to the suit; that is, you were not a party yourself?

A. No.”

The record is incumbered with a great mass of testimony upon this question alone, submitted at the hearing of a motion for a

new trial. If it serves any good purpose it shows that the juror did not intentionally misstate his relation to the case of Kirby against Kirby, and that the misunderstanding was due not to any misconduct of the juror, but to the mode of inquiry adopted by counsel. He was advised by the juror that he was not a witness, but was connected with the case, and the natural inquiry would have been what that connection was. The counsel chose to ask a leading question, to which he evidently expected the juror to give his assent, which could be done by an answer of either "yes" or "no" according to his manner and tone of voice, whether with a rising or falling inflection. So likewise his dissent.

The court, therefore, did not err in overruling the motion for a new trial upon this ground.

For the reasons above stated, the judgment will be reversed and the cause remanded for a new trial.

Burch & Johnson, for plaintiffs in error.

Theodore Horstman, for defendant in error.

1904.]

Logan County.

PLEADING WHERE NEGLIGENCE IS INVOLVED.

[Circuit Court of Logan County.]

**THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY
CO. v. WILLIAM P. TEHAN, A MINOR, ETC.**

Decided, February Term, 1904.

Negligence—In Placing an Employe at New Work and Giving Him an Inexperienced Assistant—Pleading Establishing a Causal Connection with the Injury—Defective Averment Supplied by the Evidence—Negative Propositions—Damages for Loss of an Eye. Amended—Amendment Implied—Requests for Special Charges of

1. Where the issue is not one of *quantum* of danger in the abstract, but is one of danger to the plaintiff, who in obedience to an order was injured while doing new work with the dangers of which he was not acquainted, the necessary causal connection is established in a petition embodying such facts in its allegations, and the petition is good against a general demurrer as a pleading of negligence.
2. If the causal connection is established between the general negligence alleged and the injury, it is also established between the special acts of negligence alleged limiting the general allegation.
3. The rule laid down in 49 O. S., 598, constitutes an exception to the general rule in this state that the duty to plead and the burden to prove contributory negligence is upon the defendant, and the exception should not be extended on mere suspicion to a case like the one at bar, which does not involve negligence in the matter of a defective appliance or an unsafe place to work.
4. Every purpose of pleadings is accomplished, when it is apparent to the parties and the court at the time the trial begins, what the affirmative and negative averments are upon which the plaintiff relies for a recovery.
5. Where a bill of exceptions showing all the evidence and proceedings at the trial is made by proper order a part of the record, and the evidence and proceedings sustain the recovery, an amendment to a defective pleading will be implied even on error; but if the evidence and proceedings do not sustain the recovery, the fact that an amendment was allowed and filed will not aid the verdict or judgment.
6. A case is presented for the jury, where there is a conflict of evidence with testimony admitted without objection which supplies omitted material averments of the petition.

7. Requests of the defendant for special charges to the jury, which set out a certain set of circumstances under which the plaintiff would not be entitled to recover, are satisfied by clear and correct statements in the general charge of the material and necessary facts which must be established by the plaintiff in order to recover.
8. A verdict of \$5,000 for the loss of an eye is not excessive where the one injured is a young man just entering upon a career as a mechanic.

The original action was commenced in the court of common pleas by defendant in error as plaintiff against plaintiff in error as defendant. Said plaintiff stated in his petition in substance: That defendant, a railroad corporation, owns and operates extensive machine and repair shops in the city of Bellefontaine; that on January 1, 1902, plaintiff was employed by defendant to work in said shops as a boilermaker's helper, his duty being to help a boilermaker as an assistant, but not to perform a regular boilermaker's work; on or about July 21, 1902, the foreman of said boilermakers' shop ordered plaintiff to perform a regular boilermaker's work; on July 22, 1902, while plaintiff was performing a boilermaker's work under said orders, he was assisted by a young man, totally inexperienced in said work, as an assistant and helper; while plaintiff was so employed and with said inexperienced assistant, in cutting off the rivets of the connection of a boiler, plaintiff was holding a tool, called a side-set, on the head of a rivet and said assistant was striking said tool so as to remove the head of said rivet; said assistant struck said tool so carelessly and unskillfully that a piece of the head of said rivet struck plaintiff in the left eye, totally destroying the sight thereof so that the said eye had to be removed.

"Plaintiff avers that there was negligence on the part of defendant in the following particulars: 1. The plaintiff was young and inexperienced and did not know the danger he incurred by obeying the orders of said foreman in performing a regular boilermaker's work, instead of continuing in his regular employment as a boilermaker's helper and assistant. Defendant was guilty of negligence in ordering plaintiff, with his inexperience, to engage in and perform the duty of a regular boilermaker and in taking him from his position and work as

a boilermaker's assistant and helper. 2. Said defendant was also guilty of carelessness and negligence in placing said inexperienced young man to work with him as an assistant. He avers that his injury and the loss of his left eye was caused solely by the carelessness and negligence of the defendant. He also avers that he, plaintiff, was not guilty of any carelessness or negligence and that he was without fault on his part. He prays judgment in the sum of \$10,000."

To this petition defendant filed a general demurrer and the same was overruled. Defendant thereupon filed its answer, in the first defense of which it denied each and every allegation in the petition of unskillfulness and inexperience on the part of the plaintiff and said assistant at the time of the injury and all allegations of carelessness or negligence on the part of defendant. For a further defense said defendant avers that after plaintiff had been in the employment of defendant as a boilermaker's helper and as an apprentice or learner for more than six months continuously at low wages, he represented and stated to defendant's foreman that he, plaintiff, had acquired sufficient knowledge and skill in the business to entitle him to an advanced position and at advanced wages and that he had sufficient knowledge and skill to manage and conduct the cutting of rivets in which he was engaged at the time of the injury and in the manner in which he was so engaged. Defendant states that in fact said branch of the business is one of which sufficient knowledge and skill to conduct it safely can be acquired by any one and especially by one of plaintiff's mechanical aptitude in a few days or even a few hours. That defendant's foreman, upon diligent and careful inquiry, believing plaintiff's said statements to be true, expressly employed plaintiff to do this work he was doing at the time of his injury, paying him therefor increased wages. Defendant denies plaintiff's alleged want of skill and his alleged want of knowledge or information of the dangers and perils incident to and connected with his employment at the time of said injury. Defendant denies the want of knowledge, skill and experience on the part of the person who was helping plaintiff at the time of said injury and through whose alleged negligence plaintiff asserts the injury was caused in part. Defendant avers that said assistant was

sufficiently skillful in that line of employment and was of sufficient experience in the use of sledge hammers and such like tools to be employed by defendant to perform the service in which he was engaged at the time of said injury and that before the employment of said assistant by defendant said defendant made diligent and careful inquiry as to said assistant's knowledge, skill and experience in the use of said tools, and from the knowledge and information acquired by defendant on such inquiry defendant believed and had the right to believe that said assistant then possessed such sufficient skill, knowledge and experience. Defendant further avers that said assistant was, at and before the time of the injury, an acquaintance of and well known to plaintiff. It is further averred that plaintiff's injury occurred "through one of those unavoidable accidents possible to occur in any mechanical trade or business, when conducted by the most skillful, which can neither be foreseen nor guarded against by any care or diligence. Plaintiff by reply denies each and every allegation of the second defense of the answer.

Upon issues thus joined the trial was had to a jury, certain evidence referred to in the opinion was given by plaintiff without objection, the court charged the jury as is stated hereafter and a general verdict returned for plaintiff in the sum of \$5,000. Defendant filed its motion for a new trial, one ground of which was that the verdict is against and not supported by sufficient evidence. Pending this motion and before judgment was entered on the verdict, plaintiff, against the objection and over the exception of defendant, obtained leave to file an amended petition to conform his pleading to the facts proved. An amended petition was accordingly filed and defendant, without waiving his objection to such filing, obtained leave to file and thereupon filed an amended answer. To this amended answer plaintiff filed a reply. Defendant's motion for a new trial was thereafter overruled and judgment for plaintiff was entered on the verdict. The errors assigned are, in substance, in overruling defendant's demurrer to the petition; in refusing requests to charge; in the charge as given to the jury; in permitting plaintiff to file his amended petition; that the verdict is

1904.]

Logan County.

not supported by sufficient evidence; that neither the petition, or the amended petition states facts sufficient to constitute a cause of action, and the judgment is therefore contrary to law.

MOONEY, J.; DAY, J.. and NORRIS, J., concur.

The asserted defects in the original petition are these: Failure to state that the work at which plaintiff was engaged at the time of the injury was dangerous and *more* dangerous than plaintiff, as alleged, was employed to perform; failure to state that the helper assisting in the work at said time was incompetent and that defendant knew it was negligent in not knowing it and that plaintiff did not know it; and failure to allege a causal connection between the alleged acts of negligence and the injury to plaintiff.

It is not expressly alleged that the work was dangerous. It is stated that plaintiff in obeying orders and directions of the foreman at the time did not know the *dangers* that would attend his act of obedience, and that while performing such service he was injured without fault or negligence on his part. If these averments stood alone, no account being taken of any charge of negligence against defendant, we think the inference would arise from the facts stated, that the work was dangerous. It is not stated that the work was *more* dangerous in the abstract than the work was that plaintiff alleges he was employed to perform. It is believed that the question is not one of *quantum* of danger in the abstract, but is one of danger to the plaintiff. It is alleged in the petition that plaintiff had been employed as a helper continuously for more than six months. It is not alleged that the work of the helper is in any degree dangerous to the helper himself. Unless we infer that such work is dangerous to the helper himself, it follows that if the work plaintiff was doing at the time of the injury was dangerous it was also more dangerous than the work of the helper. Again, if plaintiff worked as helper for six months it must be assumed that he knew the dangers incident to his work as helper. He alleges that he did not know the dangers of the work he was directed to do and was doing at the time of the injury. It was more dangerous *to him* to do work with the dangers of which he was

not acquainted than to do work with the dangers of which he was acquainted. Hence while not stated, it may be inferred that the work he was doing was more dangerous to him than the work he was employed to do and the ordinary risks of which he agreed to assume (*Consolidated Coal Co. v. Hoenni*, 146 Ill., 614; *Cincinnati, etc., R. Co. v. Lang*, 118 Ind., 579; *Pittsburg, etc., R. Co. v. Adams*, 105 Ind., 151; *Chicago, etc., R. Co. v. Bayfield*, 37 Mich., 210). It is not directly alleged that plaintiff was injured through or because of the particular acts of negligence of defendant charged in the petition. It is, however, alleged that plaintiff without fault on his part was injured through the negligence of defendant and that defendant was negligent in the following particulars: (Specifying them). It is also expressly stated that plaintiff having been employed to do certain work, was ordered to do other work with the dangers of which he was not acquainted and that while, in obedience to such order, *he was doing the new work* he was injured. We think this latter establishes the causal connection and besides was sufficient as against a general demurrer as a pleading of negligence (*Davis v. Guarnieri*, 45 O. S., 470), and besides we are also of opinion that while negligence is thus generally alleged, the general allegation would on demurer be limited by the particular specifications of negligence that are pleaded and those that are implied from them. In this view if the causal connection is established between the general negligence alleged and the injury it is also established so between the special acts of negligence alleged limiting the general allegation.

It is not expressly averred that the assistant, Ivory, was *incompetent*. It is averred that defendant was negligent in ordering plaintiff to do this work in connection with William H. Ivory, a totally inexperienced young man, as a helper. The allegation is in substance that defendant was negligent in ordering plaintiff to do the work under the circumstances disclosed and with an inexperienced assistant. Ivory may have been not incompetent to do the work but yet being without experience it may have been an act of negligence to send him to assist plaintiff under the circumstances then existing.

“The allegation in a pleading that the party complained against negligently committed the particular act which led to

1904.]

Logan County.

the injury whose redress is sought furnishes the predicate for the proof of all such incidental facts and circumstances both of omission and commission, as fairly tend to establish the negligence of the primary fact complained of" (*Davis v. Guarnieri*, 45 O. S., 470).

See particularly *Golley & Finley Iron Works v. Collan*, 9 C. C., 217—a case resembling this one on the facts. If it furnishes such predicate the general allegation is good against a general demurrer and at all events, in the absence of a motion to make definite and certain, is sufficient.

While it is very apparent that the petition is threadbare in spots still it is very doubtful whether the court below was not right in overruling the demurrer to that pleading. At the very least we think that every fact necessary to constitute a cause of action can be inferred from the facts expressly stated.

Certain other alleged defects in the petition are insisted to be fatal under the rule announced in the case of *Coal & Car Co. v. Norman*, 49 O. S., 598. That case announces a rule which constitutes an exception to the general rule in this state that the duty to plead and the burden to prove contributory negligence is upon the defendant. The general rule in this state still being recognized, the exception should not be extended upon mere suspicion. This case is not one of defective appliance or unsafe place and negligence charged in connection therewith and hence the case referred to does not apply. If it did, Ivory was employed by defendant two days before; defendant then had an opportunity and a duty to know what his qualifications were; plaintiff denies knowledge of the dangers and if those arose from the inexperience of the helper, then the denial goes to the effect of the inexperience of Ivory; defendant had conducted the shop for years and so is presumed to know what the fitness of Ivory was as well as the effect of his inexperience; so that from the facts stated, the facts required to appear by the rule laid down in the case cited may be inferred.

We have thus far proceeded upon the theory that if the demurrer to the petition were improperly overruled the error should reverse the judgment. There are exceptions to this rule and we proceed to inquire whether the case at bar is not within one or two of them.

The demurrer having been overruled defendant by leave filed its answer. Plaintiff had pleaded that his injury was due to defendant's negligence and arose from a risk not assumed by him. The first defense of the answer denied the negligence and also denied that the risk was not assumed. Under this pleading of the first defense all the evidence given at the trial would have been proper. But defendant by its second defense alleged that the work was *not* dangerous; that all risk of injury therefrom was open and apparent to plaintiff as to defendant's foreman or any other of its agents or servants; that plaintiff in a few days or even a few hours could acquire the knowledge and skill to perform said work safely and skillfully; that Ivory had sufficient *knowledge, skill and experience* to perform his part of the work properly, and before defendant employed said Ivory it made diligent inquiry and ascertained therefrom that he had such knowledge, skill and experience and defendant then believed and had good reason to believe such fact and that said Ivory was an acquaintance of and well known to plaintiff. It is further stated that the injury to plaintiff was due to an accident unavoidable in any mechanical trade, even when conducted by the most skillful. The plaintiff by reply denied these allegations.

It will not be contended that if the negative averments made up by the denial of these allegations of the second defense were inserted in the petition, the alleged defect would not exist. It is conceded by this second defense that the injury resulted from doing the work—hence the causal connection; that the injury or the possibility of it necessarily attends the work—hence it is dangerous; that defendant did inquire and know the fitness of Ivory to do the work and it is not alleged that plaintiff had made such inquiry or had such knowledge. Defendant denies acquaintance with Ivory and thus, taking the admission by the defendant and the denial by plaintiff together, it follows that the servant did not have equal means of knowing with the master. At all events taking all the pleadings together as they stood when the trial commenced it was perfectly patent to the parties and the court what the affirmative and negative averments upon which the plaintiff relied for a recovery in the

1904.]

Logan County.

action were. Thus every purpose of pleadings was accomplished.

“Where a material fact is omitted in a declaration the defect is cured if the subsequent pleadings put the omitted fact directly in issue.” *Elliott v. Stuart*, 15 Me., 190; *Fiebelman v. Ins. Co.*, 108 Ala., 180; *Gaines v. Summers*, 39 Ark., 482; *Worthley's Admr. v. Hammond*, 70 Ky., 510; *L. & N. R. R. Co. v. Lawson*, 88 Ky., 496; *Ritchie v. Ege*, 58 Minn., 291; *Wagner v. Mo. Pac. Ry. Co.*, 97 Mo., 512; *Allen v. Choteau*, 102 Mo., 309; *Hamilton v. St. Ry. Co.*, 17 Mont., 334; *The Nancy v. Fitzpatrick*, 3 Gaines (N. Y.), 38; *Knowles v. Norfolk Southern Ry. Co.*, 102 N. C., 59; *Cowel v. South Denver Real Estate Co.* (Col.), 63 Pac., 991; *Savings Bank v. Barrett* (Cal.), 58 Pac., 914. In this case a demurrer to the complaint was improperly overruled, yet it was held that the express denial of the omitted fact by the answer supplied the defect. *Fleuce v. Feru*, 60 Pac., 434; *Beebe v. Latimer* (Neb.), 80 N. W., 904. *Londerman v. Judy*, 2 C. C., 351, reversed on other ground, 48 O. S., 562.

In *Yocum v. Allen*, 58 O. S., 280, it was held that where a demurrer was improperly overruled to a petition a judgment thereon for plaintiff should not be reversed if it appears from the whole record that the overruling of the demurrer was an error which was not prejudicial to the adverse party. In that case the court quotes and enforces the provisions of Section 5115, Revised Statutes.

“The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.”

In harmony with this statute and upon the very reasoning of the case last cited it must be here held that the error, if any, in overruling the demurrer was not prejudicial to plaintiff in error.

Again:

“Where an averment which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue

involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, then after verdict the defective averment which might have been had on demurrer is cured by the verdict." *Heymann v. The Queen*, 12 Cox C. C., 383. And see *Gittings v. Baker*, 2 O. S., 21; *Howe v. Ry. Co.*, 18 C. C., 600; *Davey v. Miller*, 37 W. L. B., 203; Gould on Pleading, 5th Edition, 558.

For a stronger reason this should be the law if without objection at the trial evidence is admitted to prove the allegation omitted or defectively stated. It has been held repeatedly in this state that where in the absence of a denial the allegations of a pleading are at the trial treated as denied a verdict and judgment rendered on that theory will not be disturbed for want of such denial. If this rule obtains in the absence of the usual pleading why should it not obtain in the case of a defective pleading as well.

We are of opinion that for the reasons stated and upon the proceedings had at the trial hereafter referred to, the question of the defect, if any, in the original petition is not now available to plaintiff in error as a ground to reverse the judgment and so the error, if any, in permitting the amended petition to be filed after verdict rendered, is also immaterial. Where the record of a particular case consists solely and alone of the pleadings, rulings thereon, record of the fact of a trial, verdict and judgment, and the petition is wanting in a material averment, it may be necessary to show an amendment to the petition to support a judgment thereon. But where, as here, a bill of exceptions showing all the evidence and proceedings at the trial is made by proper order *a part of the record* such amendment will rarely, if ever, be necessary, for in such case if the evidence and proceedings sustains the recovery an amendment will be implied even on error; but if the evidence and proceedings do not sustain the recovery, the fact that an amendment was allowed and filed will not aid the verdict or judgment.

The bill of exceptions, a part of the record, shows that at the trial and without objection plaintiff below offered evidence tending to prove that on December 29th, 1900, plaintiff, then seventeen and one-half years old, entered the service of defendant

1904.]

Logan County.

at said shops as a rivet heater, his duties being to heat rivets, pass rivets and do other odd jobs around the shops, such as holding lights for boilermakers; he continued in this employment until about January 1, 1902, when he was advanced to the position of helper by the general foreman of the shop; the duty of a helper is to assist the boilermaker in whatever the latter has to do, but "he is not supposed to learn the trade at all." Plaintiff continued in the position of helper until July 21, 1902, when he was ordered by defendant's foreman to hold a side-set, which is a part of a regular boilermaker's work. He had never before performed that kind of labor, had no knowledge of its danger and neither defendant or any of its agents or servants nor any one else gave him any instructions as to how the work should be done, and no one informed him as to the danger incident to that kind of work. The side-set is a tool used in cutting the heads off boiler rivets when it is desired to remove the rivets from a boiler. The side-set is something the shape of a long bitted hammer, one edge of which is beveled something like a cold chisel and the other end shaped like the poll of the ordinary hammer. The side-set is fitted with a wooden handle about two and one-half feet long. When in use the cutting edge of the side-set is held against a rivet by the boilermaker and the helper with a sledge hammer strikes the poll of the side-set and then the head of the rivet is partly cut and partly broken off, when the rest of the rivet is driven through into the inside of the boiler and the rivet thus removed. The purpose of the side-set handle is to enable the boilermaker to stand at a point where he will not be in danger of being struck by the helper's sledge.

On July 21, 1902, plaintiff, with Ivory as his helper, worked eight hours in removing rivets from a boiler, and in that time they removed all the rivets on one side of a boiler. On July 22, 1902, they continued the work on the other side of the boiler from the time of commencing work until 8 o'clock in the morning. They were then ordered to and did perform some other work until nine o'clock, when they returned to the work of removing rivets. While removing the fourth rivet after their return, the injury of which plaintiff complains was sustained by him. At this time Ivory's hands were sore and he was

striking quite rapidly, and sometimes would hit the head of the side-set squarely, sometimes on the edges, and sometimes missed it altogether. The proper and safe manner, as plaintiff says he has since learned, for Ivory to strike was slowly and squarely on the head of the side-set. When the head of the fourth rivet was nearly off, a sliver of it flew off and struck plaintiff in the eye, destroying his sight and so injuring the organ that it had to be removed. Plaintiff never requested that he be put at this work. As a rivet heater plaintiff was paid eight cents per hour, as a helper fourteen and a half cents per hour until the middle of July, 1902, and after that plaintiff and all other helpers were paid fifteen cents per hour; boilermakers were then paid twenty-four to twenty-six cents per hour. The work of removing rivets in the manner above described is dangerous to the person holding the side-set. The danger consists in the fact that when the head of the rivet is being removed it or a part of it may fly in any direction and hit said person. To obviate this danger as far as possible skill is required on the part of the person wielding the sledge, to know with what force to strike when the head is nearly off; skill is also required on the part of the person holding the side-set to know the proper position—the angle at which the tool should be held. And with this skill on the part of both these persons the safety of the person holding the side-set requires that he hold a screen—a broom or cloth or some such article between him and the rivet to guard his person. Plaintiff when directed to do this work did not know and was not informed as to the position in which to hold the side-set, did not know and was not informed as to the necessity of a shield, and although while employed in the shop he had noticed persons using the side-set, he had never observed the same closely or more than casually. Ivory had never performed or assisted in this work before July 21, 1902; he had no knowledge of its dangers; his ability to wield the sledge, so far as skill is concerned, is such as he derived from driving spikes in railroad ties in railway repairs or construction, and this fact defendant knew and plaintiff did not know. Said Ivory was for six years an employe of defendant as a section hand, but whether immediately before his employment in the shops does not appear from the evidence. The want of skill of plaintiff, of Ivory, and

1904.]

Logan County.

the absence of a shield may each and all have contributed to cause the injury. Assuming that there was a conflict of evidence upon all these points and assuming that the evidence admitted without objection supplied omitted material averments of the petition, we are of opinion that the case so made was and is one for the jury.

Defendant below presented eleven special requests to charge. These were all in terms refused. Most of them set out a certain set of circumstances under which the plaintiff would not be entitled to recover. The court, and we think very wisely and properly, contended itself with a statement of the facts that if proved would authorize a recovery, and stated in effect that if these necessary facts were not proved the verdict should be for defendant. The charge is clear, concise and correct. The jury by reason of its clearness could understand it; of its conciseness could have remembered it, and of its correctness could not have been misled as to the law. The benefit of the special requests so far as they are correct was secured to defendant by the general direction of the court to find for defendant if the material and necessary facts upon which plaintiff's right to recover depended were not each and all of them proven.

The point upon which we have had some hesitation was the amount of the damages. But we discover that this is not stated as a ground of the motion for a new trial nor specially assigned as error here. This young man has been deprived of one eye by a violent injury. It is common knowledge that the sight of the other may thereby be impaired or lost. He was entering upon a career as a mechanic for which he had some aptitude. He may be compelled to follow other lines, or, if he continue in the same line, will or may be less efficient and will run a double hazard of total loss of sight in its pursuit. We conclude that all these facts were as well known to the jury and the trial judge as to us and that, in fixing the damages under the circumstances of this case, they had assurance of arriving at a correct result equal in every respect to us, and so, particularly when not requested, we will not hold that the damages are excessive.

We find no reversible error in the record and so the judgment is affirmed at costs of plaintiff in error. Judgment for costs

and execution awarded and cause remanded to the common pleas for execution.

West & West and Samuel H. West, for plaintiff in error.

John A. Price and Thos. M. Shea, for defendant in error.

PROMISSORY NOTE—CONSIDERATION—DELIVERY.

[Circuit Court of Hamilton County.]

AUGUSTA J. BODE v. LOUIS WERNER.

Decided, February 24, 1904.

Note—Consideration for Promise to Pay—Detriment to the Promisee May Constitute Consideration—Delivery—Pleading—Answer—Reply.

1. An answer to a petition in the short form on a promissory note, which denies that "there is any sum due the plaintiff from her as endorser," and that she did not deliver the note to the plaintiff or cause it to be delivered to him, does not set up new affirmative matter making a reply necessary.
2. The putting of a promissory note in evidence makes a *prima facie* case, and casts the burden upon the defendant; and where no testimony is offered by the defendant, a verdict and judgment on the note must be affirmed.

JELKE, J.; GIFFEN, P. J., and SWING, J., concur.

Louis Werner, plaintiff below, sued Augusta J. Bode as endorser, by filing the usual short form petition on a promissory note, to which the following answer was made:

"And now comes the defendant and for answer to the plaintiff's petition says that she denies that there is due the plaintiff from her as endorser the sum of \$1,000 with interest, or any other sum.

"Defendant further says that she did not deliver said note to said plaintiff, and did not cause the same to be delivered to him, and that he did not pay to her any consideration for the same.

"Wherefore, she prays that said plaintiff be ordered to deliver said note to her and for all other and proper relief."

To this answer no reply was filed.

On the trial plaintiff offered the note and counsel for Augusta J. Bode objected to the offering of any testimony on the ground that the issue was not closed by a reply. The objection

was overruled, and exception noted, whereupon both sides rested and the court directed the jury to bring in a verdict for the plaintiff.

We are of opinion that the above answer does not set up new affirmative matter, making a reply necessary.

On the subject of consideration the answer is insufficient.

"An answer to a suit on a promissory note, averring that there was no consideration for it, moving to the promisor, is not sufficient as a defense, as it does not preclude the possible fact that there was detriment or loss to the promisee, which constitutes a consideration for a promise as well as a benefit to the promisor. *Dalrymple, Administrator v. Wyker, Administrator*, 60 O. S., 108.

It is likewise insufficient on the subject of delivery.

"Delivery need not be specially averred in the declaration upon a note or bill. The word 'promised' or 'made' sufficiently implies delivery in pleading. Delivery, is in general, presumed from possession of the bill or note." Section 217 Randolph on Commercial Paper.

"If the maker of a negotiable promissory note does not find it in the hands of the payee, when it falls due, he should presume, as the law presumes, that it has been transferred, and pay it when and where he finds it. *Poland, J.*" *Griswold v. Davis*, 31 Vermont, 390.

Also see last sentence of Section 3171*o* of the New Negotiable Instrument Code:

"And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved," which as a statute has no application to this case but is a statement of the common law incorporated into the code.

Giving this answer its greatest merit it must be looked at as a general denial of the essential averments of the petition and as such not requiring a reply.

The note made out a *prima facie* case and put the burden on the defendant below, who offered no testimony, and hence the verdict and judgment upon the same were right and will be affirmed.

Goebel & Bettinger, for plaintiff in error.

W. A. Hicks, G. W. Hengst, contra.

FIXTURES.

[Circuit Court of Hamilton County.]

GEORGE W. C. JOHNSTON v. SAMUEL WOODING.

Decided, December 23, 1902.

Fixtures—Uncertainty Regarding, to be Resolved in Favor of the Landlord, When.

Doubt as to whether certain articles are fixtures is resolved in favor of the landlord, where the articles are not removed within the term of the tenancy or within a reasonable period thereafter.

The plaintiff leased to R. M. Quigley & Co. certain real estate near the new Cincinnati water-works for a period of two years. Without plaintiff's consent, Quigley & Co. constructed upon the premises a six-inch driven well, of the depth of 150 feet, fitted with casings, tubes, pipes and a force pump, which was operated by a vertical boiler resting upon stones which lay over the surface of the ground, all for the purpose of forcing water from the well through iron pipes diagonally across the premises, a distance of 1,200 feet. A building standing on posts and of small value, was erected over the boiler for protection. Quigley & Co. gave a chattel mortgage on all their property situated on the premises, which was foreclosed, and the pump, boiler, casing, pipes, etc., were sold without notice to the lessor. Subsequently the lessor released the premises to a third party, and thereafter the defendant attempted to remove the pump, boiler, etc., when the present suit was brought to enjoin such removal. In the common pleas a perpetual injunction was granted.

PER CURIAM.

Whatever of doubt there may be as to the nature of things in dispute herein, whether or not they are fixtures, is resolved in favor of the landlord by reason of the fact that they were not removed during the term of tenancy or within a reasonable time thereafter.

Decree for plaintiff.

*D. H. Pottenger and A. C. Shattuck, for plaintiff.**H. J. Appling, contra.*

WILLS.

[Circuit Court of Lucas County.]

AMEDIUS M. COGHLIN ET AL V. JOHN T. COGHLIN ET AL.

Decided, January 25, 1904.

The Inhibition as to Joint Wills—Separate Wills of Husband and Wife—Devising Separate Property—Not Joint Because the Disposition Made of Property is Identical.

1. Husband and wife may make the same testamentary disposition of their property, so that their respective estates may take the same course and be distributed in the same way after death; and where each by separate will undertakes to create the same trust in their respective estates for a certain number of years, the validity of the trust so created by the husband is not affected by, nor will it be terminated by reason of the invalidity of the wife's will, which is invalid on account of its defective execution, the wife dying before the husband and probate of her will being refused.
2. A joint will is not created by the execution of separate and distinct wills at different times, and the making of separate and distinct codicils to such wills at the same time by husband and wife, wherein disposition is made of the separate property and estate of each (it not appearing that the wills were in the nature of a compact), notwithstanding the will of each refers to the will and to the property and estate of the other, and that the disposition in both is practically identical.

HULL, J.; HAYNES, J., and PARKER, J., concur.

This action was brought in the court of common pleas to set aside certain portions of the will of Dennis Coghlin, especially the part of the will creating a trust and putting all of his real estate in trust for a certain period of time, and to partition such real estate among his legal heirs. The action was brought by certain of the legal heirs of Dennis Coghlin, making all of the other heirs and their representatives defendants, and also The Ohio Savings Bank & Trust Company, defendant, as administrator with the will annexed, the bank acting as administrator with the executor, John T. Coghlin, who is named in the will as such executor. A demurrer to the petition was filed in the court below by the bank, the administrator with the will annexed, and that demurrer was sustained by the court of common

pleas, and the plaintiffs, not desiring to plead further, judgment was entered in favor of the defendants dismissing the petition. Thereupon the case was appealed to this court and was argued here upon the demurrer to the petition.

The claim made by the plaintiffs, in substance, is: That about the same time that Mr. Coghlin made his will—about a year later—Mrs. Coghlin made a will, which is in effect a counterpart or duplicate of the will of Dennis Coghlin, for the disposition of her estate, and subsequently, in June, 1896, a codicil was added to each of these wills, these codicils being identical with each other except so far as it was necessary to change them to make them applicable to the wills and property of these two persons, and the claim is that the result is, in effect, a joint will—an attempt to dispose of the estates of Dennis Coghlin and of Ella Coghlin as one estate—as a joint fund and joint property, and that although they are written separately and executed separately, the effect is, it is claimed, the same as though they had been written upon the same paper and executed and attested together, and that they, therefore, fall within the inhibition of the law of this state as laid down by the Supreme Court against joint wills, and that this objection is especially applicable to the trust which is created for the disposition of the property named in these two wills, and was to continue before final distribution was made until the year 1910.

It is claimed by counsel for the demurrer that the two wills do not constitute a joint will, and that under the law of this state, as announced by the Supreme Court in the more recent decisions at least, there is no legal objection to these dispositions of this property and that, therefore, the demurrer to the petition should be sustained.

The petition discloses that Mr. Coghlin's will was made in the year 1893, and Mrs. Coghlin's will was made in the following year, and in June, 1896, a codicil to each will was made and executed. Mrs. Coghlin died May 6, 1900, three months before her husband's death—which occurred August 6, 1900—he having survived her about three months. Upon her death (presumably immediately upon her death), as stated in the petition, her will was offered for probate; but probate was refused, on the ground

that it had not been properly attested, so that the paper writing signed and executed by her never in fact took effect as a testamentary disposition of her property, and her property was disposed of according to the laws of descent and distribution, and when Dennis Coghlin died, on the 6th of August, 1900, there was no legal will of his wife in existence. The estate comprised both real and personal property, the estate of each being large, the personal estate of Mr. Coghlin amounting to about \$300,000, and his real estate to something over \$600,000, making over \$900,000 in all. The personal property of Mrs. Coghlin amounted to about \$33,000 and her real estate to about \$700,000. Mr. Coghlin in his will, after giving to his wife the household property about the homestead which belonged to her, disposed of all his property through the trust to which I have referred. It provided that all of the property, real and personal, should be held in trust by his executors until the year 1910, if both he and his wife were dead at that time, and if either survived later than that then the trust was to continue until the survivor died. The will also provided that the executor should give to Mrs. Coghlin whatever was necessary to her support, if she needed anything in addition to her own estate during this period. At the expiration of the trust the property was to be divided among the children of Mr. and Mrs. Coghlin *per stirpes*, the children of any child dead to receive the same share that the child would have received had it been living, and was thus to be divided among the children and grandchildren, if any of the children of Mr. and Mrs. Coghlin died.

In the codicil, to which reference has been made—which was executed on the 17th of June, 1896, the provisions as to the trust were altered in some respects. It was provided in the codicil that instead of a division being made by the executors, as provided under the will, that the division of the estate should be made at the expiration of the trust by three "friends," as they were called, of Mr. Coghlin, John S. Kountz, Charles F. Adams and Lawrence Newman, if they should be living, and in case any one of them was dead the probate court should appoint a man to serve. They were to report their division of the estate and that should be binding upon the executors, who should

make the division according to the report of these three persons. The codicil provided further that in the final distribution of his estate they should take into consideration the estate of his wife, Ella Coghlin, and the amount which each of the beneficiaries received from her estate, and the two estates were to be treated as one estate and the property divided so that the division would be equal among the various beneficiaries, taking into consideration the property which they got from the estate of their mother, Mrs. Coghlin. The codicil to the will of Mrs. Coghlin executed upon the same date, made the same provision as to her estate. In the will of Mrs. Coghlin there was the same provision in regard to a trust—after making certain special bequests and devisees—the same provisions as those contained in the will of Mr. Coghlin, providing that the property be retained in trust until 1910 and the codicil provided in terms identical with those made by her husband in his codicil, that what her children received from the estate of her husband was to be taken into consideration and the two estates were to be treated as one estate. With these two wills thus made and executed and the codicils thereto, Mrs. Coghlin died three months before her husband, and her will, with the codicil, was tendered for probate and probate was refused, and it never went into effect and never had any legal existence as a will.

It is claimed that considering the two wills together, they must be regarded as a joint will and the will of Mr. Coghlin must be regarded as a part of the testamentary disposition of the property under a joint will, and that a trust so created is invalid.

It was held in 14 O. S., 157 (*Walker v. Walker*):

“A joint will is unknown to the testamentary law of this state, and is inconsistent with the policy of its legislation. And where a husband and wife, each being the separate owner of property, join in the execution of an instrument in the form of a will, and treating the separate property of each as a joint fund, bequeathed legacies and devised lands to divers persons, the same can not be admitted to probate as the joint will of both parties, nor as the separate will of either.

“Although some of the provisions contained in the body of such will may be, in form and effect, several, yet inasmuch as the

provisions of such will partake of the nature of a compact, in which such provision is influenced by all the rest, all the provisions of the will must stand or fall together."

The will of these two parties, Mr. Walker and his wife, was jointly executed and attested and undertook to make a joint disposition of their property, some of their property being joint property and some owned in severalty. The Supreme Court held that this could not be done. The court say, on page 166 of the opinion:

"And the case is one in which two parties, husband and wife, attempt to make a will, which is not joint in form merely, and capable only of a several operation and effect; but one which is joint in substance; where the parties to it are severally owners of property in their individual right; where they attempt jointly to dispose of the property of each and to treat it as a joint fund, jointly devising the real property of the wife, and jointly bequeathing legacies out of the personalty of both, without designating the proportion in which the personalty of each or either shall contribute for their payment; and from which it is evident that the provisions of the instrument must have been a matter of negotiation between the parties, and in which the disposition which each of the parties would be willing to make of his or her property would, of course, be influenced and modified by the dispositions which would affect the property of the other. In short, if there can be such a thing as a joint will, this is a joint will."

After Mrs. Walker's death, Mr. Walker, disregarding this will, disposed of some of the property, thus indicating, so far as that property was concerned, his intention not to abide by this will. The great objection that is made to joint wills by the courts, so far as I can discover, is—especially where property held in severalty is undertaken to be disposed of by two or more—that such a will is irrevocable by either without the consent of the other, and this, the courts say, is foreign and contrary to the very essence of a testamentary disposition of property. It is said a will, to be valid, must always be the *last* will of the person, it is called his "last will and testament," and that a testamentary disposition of property which so binds a man to stand irrevocably by it, takes away from him the power to revoke it or alter it in any respect and can not be upheld as

a testamentary disposition of property; that the nature of a will, some of the authorities say, is always, and must be ambulatory—following the changing moods and likes and dislikes of the author of the will who becomes the testator at death. It is said changes may occur, children may die, or become unfilial, or a son may become crippled, as one case says, and the testator must be left free to change and alter a disposition that he has made of his property by will, and that a document which is of such a nature as to take unto itself the character of a compact, which is irrevocable by either party without the consent of the other, can not be sustained. That is the doctrine of this case and the doctrine of some other cases. The weight of authority, however, is that joint wills, if they are not changed or revoked during the life of either—each abiding by the will—will be sustained, although the will is executed and attested jointly in one paper, and in a case in 39 O. S., 639 (*Betts v. Harper*), the doctrine of *Walker v. Walker*, 14 O. S., 157, is somewhat limited. The Supreme Court say in this case, in the syllabus:

“Tenants in common of real estate who are also owners, severally, of personal property, may dispose of the same by will, by uniting in a single instrument, where the bequests are severable and the instrument is not in the nature of a compact, but is, in effect, the will of each, revokable by him, and subject to probate as such several will; and where the instrument is not offered for probate until the death of all executing it, the same may then be admitted to probate as the will of each and all such persons. *Walker v. Walker*, 14 O. S., 157, limited.”

This will which was sustained by the Supreme Court is in one short paragraph:

“We, Agnes Harper and Penrose Harper, of the county of Hocking and state of Ohio, do make and publish this our last will and testament, in manner and form following, that is to say: First, it is our will that our funeral expenses and all our just debts be first fully paid; secondly, that all of our property, both real and personal, go to James Betts and John Drue Betts and their heirs forever; lastly, we hereby constitute and appoint James Betts to be executor of this our last will and testament, revoking and annulling all former wills by us made, and ratifying and confirming this, and no other, to be our last will and testament.”

The court say, on page 641 of the opinion, delivered by Judge Okey, referring to the Walker case:

“The case before us is unlike *Walker v. Walker*. Agnes Harper and Penrose Harper were each the owner of personal property, and they were owners, as tenants in common, of real estate. Each desired to bequeath her personal property to James Betts and John D. Betts, and each desired to devise to them her undivided share of the real estate. They could unquestionably have done this by two instruments, but they could do it as effectually by one. This instrument was, in effect, the separate will of each. Either could have revoked it, so far as it was her will. On the death of Agnes, in 1872, the instrument might have been admitted to probate as her will; and in 1874 it might have been admitted to probate as the will of Penrose; but in 1875 it was properly admitted to probate as the will of both. The authorities, it will be seen, are in some conflict, but the view we have stated is supported by reason and the manifest weight of authority.”

In the case in 14 O. S. the Supreme Court mention the fact that the singular number is used in the Wills act instead of the plural, arguing from this that it was not contemplated by the Legislature that more than one person should join in a will. The court in the 39 O. S. criticise this and say, on page 641 of the opinion:

“The provisions of the English statutes and the statutes of the various states upon the subject are precisely similar to our own; and the conclusion that they indicate a policy that two or more persons may not unite in the same instrument in making their wills, whatever the form of the instrument may be, is only reached by a rigid, and as we think, altogether unwarranted adherence to the mere letter of the statute. The provisions of the statute relating to the execution of deeds are similar, and yet nobody has ever doubted that any number of persons having an interest in property may join in an instrument conveying it.”

A case in 136 Pa. St., 628 (*Estate of Mary Cawley, deceased*), is a comparatively recent case, and the authorities are collected to some extent in the opinion and discussed. The court say in the syllabus, second paragraph:

“If two or more persons own property in common, there is no objection, on principle, to their joining in a testamentary

disposition of it, and this might be called a joint will. Whether, after the death of one or more of the makers, the surviving maker may revoke such a will, as to his title or share of the property devised, not decided.

“Brother and sister joined in executing a paper in the following form: ‘I, B. C., should I be the first to die, and I, M. C., should I be the first to die, give, devise and bequeath, and to the survivor of either of us, all the estate of the decedent for life with remainder over. Throughout the paper, except in the clause appointing an executor, the operative words were in the singular number.

“This instrument was not a contract, in form or effect; nor, there being no joint property or joint devise, was it a joint will. It was properly a double will, and must be construed and treated as the separate will of each maker, as fully as though a separate copy had been executed by each. Wherefore, after the death of one, it was revokable by the other as to his own property.”

The brother died, in this case, and after that the sister died. This joint or double will, made March 16, 1886, was offered for probate. Later, on the same day, a will was presented which had been executed by the sister after the making of the joint or double document, to-wit, on September 5, 1887. The register of deeds held that this last will could not be admitted to probate. The case was taken to the next court above the register—the name of the court does not appear in the report—and that court held that by the making of the subsequent and separate will she revoked her disposition of the property as made in this joint document. The opinion of the court is given in this volume and it is quite full upon that question, holding that she had the power to revoke the disposition of her property that she had made in the joint will; and the Supreme Court of Pennsylvania sustains this holding, and discusses the question on page 638 of the opinion, citing numerous authorities, among which is *Walker v. Walker*, 14 O. S., 157. They say:

“Another class of questions is presented, when two or more persons make reciprocal testamentary provisions in favor of each other whether they unite in one will, or each executes a separate one. Such wills may be described as mutual or reciprocal. Their validity does not seem to be doubted, after the death of the respective testators; but the extent of the power of revocation in the survivor, after the death of one or more of the

testators, is a question still in controversy and upon which different conclusions have been reached. In *Evans v. Smith*, 28 Ga., 98, the will was signed by two, and presented by the survivor for probate. No revocation was attempted, and the only question really before the court was the validity of the paper as the will of the deceased signer. The court held it valid, characterizing it as a "double will." In *Lewis v. Schofield*, 26 Conn., 452, a similar will was presented, and its validity upheld by the court. In *Betts v. Harper*, 39 O. S., 639, the testators were tenants in common. After the death of both it was probated as the separate will of each, and the earlier case of *Walker v. Walker*, 14 O. S., 157, which had denied the validity of such a will, was distinguished and qualified."

Other cases are referred to on this page of the opinion. The court say, on page 640, referring to this will:

"Both adopted the same written expression of that desire, and executed it. The will so made must be regarded, therefore, as the separate will of each testator, as fully as though the will of each had been separately drawn up and signed. There was no joint property or joint devise. It is not, therefore, a joint will. It is not a contract between the makers in form or in effect. No consideration passed from one to the other, and none is suggested, except the affectionate interest which this aged brother and sister felt for each other."

It seems to us that these two papers—Dennis Coghlin's will and the will of his wife—do not constitute a joint will, as to bring this will within the prohibition of any authority that has been called to our attention. The property disposed of in the two wills is separate property. Mr. Coghlin had his estate, amounting to nearly a million dollars, and Mrs. Coghlin had her estate, amounting to something more than seven hundred thousand dollars. Both desired, apparently, that their property be held in trust until the year 1910, or longer if either survived longer; the trust was to continue until the death of the survivor, and both desired that their property should then be divided among their children, share and share alike, and each provided for the same manner of division and each desired that their children in the final disposition of their estates should have the same amount of property in value, considering the estate of both and the share that each child got from

the estate of the other. The wills were executed and attested at different times and disposed of different property—separate property and separate estates. They do not seem to have taken the form of a compact or an agreement, which is regarded as objectionable by some of the authorities, but they are separate and distinct testamentary dispositions of property, although the disposition in each is practically identical with that of any other. There is nothing that prohibits a husband and wife from disposing of their property by will in the same manner, and so that their estates shall take the same course and be distributed in the same way after their death, or shall be distributed at the same time after their death among their children, looking to the welfare of the children and desiring that each shall have the same share considering the estates of both. This form of a disposition of their property could not have been brought about, of course, without discussion between them; that is clear—the matter must have been talked over and each must have known the manner of will that the other made, but that would not invalidate the disposition, so far as we are able to discover, or make it objectionable on the ground that it was a joint will. But, in any event, in this case it appears that there never was in fact but one legal will; there never was in fact but one will. While Mrs. Coghlin had undertaken to make a will, her will was invalid, null and void, and so held when offered for probate, and this was done before the death of Mr. Coghlin, for, according to the petition, she died three months before his death, and the petition alleges that upon her death her will was offered for probate and probate refused. So that at the time of his death, with this will standing unrevoked and unaltered, his wife's will having been held null and void, there being no allegation to the contrary, it would be presumed that Dennis Coghlin knew this to be the fact. At least there is no allegation in the petition that he did not know it, and with no will of his wife in existence at the time of his death, his will is left as the testamentary disposition of his property. But, regardless of that, if his wife's will had been admitted to probate, or if he had died first leaving her with her will to be afterwards admitted to probate, in our judgment these two documents, taken

together, are not within any rule of law prohibiting such a testamentary disposition of property. We think that while they refer to each other and each refers to his or her estate and to the estate of the other, they are in reality and in fact separate and distinct dispositions of property and separate wills under the authorities, some of which I have referred to, and we think that either had the power to revoke his or her will if he or she saw fit to do so. But neither of them attempted to revoke the will so made.

The ultimate object of this action, or its real object, is a partition of the real estate described in the petition; to set aside the trust and partition the real estate among the legal heirs of Dennis Coghlin. It is said that with Mrs. Coghlin's will declared null and void, this estate can not be divided as provided for in this will. Whether this is true or not, we do not think it necessary to decide at this time; that question will come up properly when the time comes for a distribution of the estate, at the expiration of the trust, January, 1910. That does not affect the trust itself, that does not affect the provision of Mr. Coghlin's will that his estate should be held in trust until January, 1910, the heirs until that time to receive only the income of the estate. What effect the invalidity of the will of Mrs. Coghlin may have upon the distribution, if any, at that time, we shall not now discuss or decide. The main object and purpose of this will evidently was that the property should be held in trust, the heirs not to receive the property or to have any power to dispose of it in any manner until the expiration of the trust, they receiving during that time only the income of the estate. This was the main feature of this testamentary disposition of this property. That is not affected in any way by the death of Mrs. Coghlin or by the fact that her will was not admitted to probate, or the fact that she had made a will of similar character, so far as the trust was concerned, and it is the trust provision of the will, so far as it relates to the real estate, that is sought to be set aside here in order that it may be partitioned among the heirs of the estate. It is not asked that the trust, so far as the personal property is concerned, shall be set aside or altered in any

Schell et al v. Youngstown Iron, etc., Co. [Vol. IV, N. S.]

way. The demurrer to the petition will be sustained, and the petition dismissed.

Smith & Beckwith and Cole, Whitlock & Milroy, for plaintiffs.
Hamilton & Kirby, for defendants.

ACTION FOR NEGLIGENTLY CAUSING DEATH IN A FOREIGN STATE.

[Circuit Court of Mahoning County.]

ALVIDA SCHELL ET AL V. THE YOUNGSTOWN IRON & SHEET CO.

Decided, March Term, 1904.

Section 6134a, Ohio Revised Statutes, Construed—Jurisdiction of Ohio Courts—To Enforce Statute of Another State—For Negligence in Causing Death of Citizen of that State.

A statute of state of Pennsylvania will be enforced in Ohio for negligently causing death to citizen of that state. The courts of this state have jurisdiction in actions to recover damages under the statute of the state of Pennsylvania for negligently causing the death of a person in that state, although such person and his next of kin were all citizens of such state at the time of the injury.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

The action below was by the widow and children of Daniel Schell for negligently causing the death of the husband and father of plaintiffs in error. The petition averred that Schell at the time of his death was a resident of the state of Pennsylvania as were also the wife and children; that the widow and children are still such residents, and that the negligence which caused his death took place in the state of Pennsylvania; if, therefore, plaintiffs have a cause of action it must be under a statute of Pennsylvania.

The petition further avers that the state of Pennsylvania has such statute by which the wife and children have a right of action for negligently causing the death of the husband and father, and that the wife and children are the proper parties plaintiff under such statute for such wrong.

1904.]

Mahoning County.

The petition sets forth the statute of Pennsylvania, which is very much like the statute of this state, except that under the statute and Constitution of that state the amount of recovery is unlimited, subject alone to the determination of the court or jury.

The petition further sets forth that the courts of Pennsylvania enforce our statute upon the same subject, in the same manner and to the same effect as our courts, except only as to the amount of recovery and as to who shall be parties plaintiff, and avers that the negligence complained of in the petition constitutes a cause of action in that state as it does in this state.

To this petition there was a general demurrer interposed in the court below, which was sustained and final judgment rendered, dismissing the petition at plaintiff's costs.

The claim of defendant's counsel made in the court below and also in this court is: That the demurrer was properly sustained for the reason that the law, as it now is in this state, prohibits an action in the courts of this state for damages for negligently causing death in another state, except where the deceased was a citizen of our own state, and in support of that claim Section 6134a of the Revised Statutes is invoked. That Section provides as follows:

“(Right by statute of other state, territory or country enforced.) Whenever the death of a citizen of this state has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other territory or foreign country.” 91 V., 408; 95 V., 401.

For the purpose of ascertaining the intention of the General Assembly in enacting this statute and what is its proper construction, it is important to ascertain what was the law upon this subject previous to its passage. It is insisted upon the part of demurrant that, without this provision, no action could be maintained, and that its purpose is only to give such right of action when the deceased was a citizen of this state. It must

be conceded that we have no authoritative enunciation of our Supreme Court upon this question. In the case of *Woodward, Administratrix, v. Michigan Southern & Northern Indiana R. R. Company*, 10 O. S., 121, the only question decided was that an action could not be maintained for negligently causing the death in the state of Illinois by an administrator appointed in this state, as such administrator would be a trustee subject to the laws of this state, and must distribute the fund in accordance with our laws, which was entirely different from the manner prescribed by the statute of Illinois, but in the opinion it is said:

“We do not undertake to decide whether an administrator appointed under the law of Illinois, might or might not maintain such an action, for the purpose of recovering the fund to be distributed under the law of Illinois. That case would present very different considerations from the present.”

In the case of *Hover, Admr. v. The Pennsylvania Company*, 25 O. S., 667, it was determined that an action could not be prosecuted in this state under our statute for negligently causing death in another state, and that was all that was determined in that case. The case of *Brooks, Admr. v. Railway Company*, 53 O. S., 655, and unreported, we take it, is to the same effect, as it was decided on the authority of the last two cases. The case of *Railway Company v. Fox*, 64 O. S., 133, Section 6134a, as it existed previous to the amendment of 1902, was under consideration, but all the court decided was that our courts would not entertain an action under the law of the state of Indiana for the reason that that state did not enforce our statute in the manner required by Section 6134a.

These cases in no sense sustain the contention that the courts of this state will not entertain an action when properly brought under the statute of a sister state, when such state enforces our statute of like character, under the rule of comity between the states, and therefore the question as to whether or not our courts would entertain an action upon the statute of a sister state for negligently causing death where the injury and death took place in such state independent of Section 6134a, is still an open one, it not having been determined by our Supreme Court.

1904.]

Mahoning County.

Why should not such action be maintained in our courts? Nearly all if not all the states of the Union have statutory provisions substantially the same as Lord Campbell's Act. Buswell on Law of Personal Injuries, Section 22.

These statutes are not penal in their nature, but remedial. They simply preserve to the next of kin, ordinarily the decedent's family, that to which the decedent would have been entitled had death not ensued. The only reason that the action could not be maintained at common law was one of the old fictions with which it abounds that such a right of action died with the party. In *Stewart v. Railroad Company*, 168 U. S., 448, Mr. Justice Brewer, in speaking of this character of action, says:

"Notwithstanding the ability with which the arguments in support of this conclusion are presented in the opinion of the court of appeals, we are unable to concur therein. A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona*, damages therefore could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states, in more or less conformity to what is known as Lord Campbell's Act, is to provide the means for recovering the damages caused by that which is essentially and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured by the death. An action to recover damages for a tort is not local, but transitory, and can as a general rule be maintained wherever the wrongdoer can be found (*Dennick v. Railroad Company*, 103 U. S., 11). It may well be that where a purely statutory right is created, the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common law obstacle has been removed. At least it has been held in this court in repeated cases that an action for such tort can be maintained 'where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced.' *Texas & Pacific Railway v. Cox*, 145 U. S., 593,

605; see also *Dennick v. Railroad Company*, 103 U. S., 11; *Huntington v. Attrill*, 146 U. S., 657; *Northern Pacific Railroad v. Babcock*, 154 U. S., 190."

As we have already said, nearly if not all the states of the Union have made provisions by statute for correcting this so-called maxim of the common law and furnishes a right of action to persons dependent upon the party whose death is caused by a wrongful or negligent act, for the damages sustained in consequence of such death.

It becomes important here to consider the fact that in nearly all the states—there being but three or four exceptions—these statutes are enforced in the different states (Dicy on Conflict of Laws, American Notes, 667, *et seq.*). And why should it not be so? Of what more force and effect should the common law have in the states than the generally recognized law of the states, that a party shall be responsible for negligently causing the death of another? It leads to an absolute absurdity to say that a settled legal policy as shown by the statutes of nearly all the states shall not be effective in each state, for the reason that it is against some fiction or maxim of the common law, and especially when that policy is in accord with all our conceptions of what is right and just.

In support of this theory we refer to but a few cases. In *Higgins v. Central New England Railroad*, 155 Mass., 180, it is said:

"Assuming that the cause of action is one not existing at the common law, but created by the statute of another state, we have seen that it is transitory, and that it survives and passes from the deceased to his administrator. When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other states shall be heard here. These principles require that, in cases of other than penal actions, the foreign law, if not contrary to the public policy, or to abstract justice or pure morals, or calculated to injure the state or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do

substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this state or its citizens, or if we have not jurisdiction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here can not give a substantial remedy, we are at liberty to decline jurisdiction. *Blanchard v. Russell*, 13 Mass., 1, 6; *Prentiss v. Savage*, 13 Mass., 20, 24; *Ingraham v. Geyer*, 13 Mass., 146; *Tappan v. Poor*, 15 Mass., 419; *Zipcey v. Thompson*, 1 Gray, 243, 245; *Erickson v. Nesmith*, 15 Gray, 221, and 4 Allen, 233, 236; *Halsey v. McLean*, 12 Allen, 438, 443; *New Haven Horse Nail Company v. Linden Spring Co.*, 142 Mass., 349, 353; *Bank of North America v. Rindge*, 154 Mass., 203."

In *Wooden v. Western New York & Pennsylvania Railroad Company*, 126 N. Y., 14, Finch, J., says:

"Certain propositions essential to the inquiry before us have been explicitly determined in *McDonald v. Mallory*, 77 N. Y., 546, and need no other citation for their support. That case held that the liability of a person for his acts, whether wrongful or negligent, depends in general upon the law of the place in which the acts were committed; that actions for injuries to the person in another state are sustained here without proof of the *lex loci* because they are permitted by the common law which is presumed to exist in the foreign state; that such presumption does not arise where the right of action depends upon a statute which confers it; and that in such case the action can only be maintained here by proof that the statutes of the state in which the injury occurred give the right of action and are similar to our own.

"Upon the question of similarity we have also held that the two statutes need not be identical in their terms or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle and possessing the same general attributes (*Leonard v. Columbus Steam Nav. Co.*, 84 N. Y., 53). It is quite evident that the two statutes are of similar import. They are founded upon the same principle, are aimed at the same evil, construct the same sort or kind of action, and give it for the same class of individuals. In both the utter failure of redress at common law where the injury ended in death was the injustice for which a remedy was enacted; and in both the new action was given for the benefit of those who had suffered an injury as the consequence of the wrong. This fundamental agreement in the main and substan-

tial characteristics of the two statutes is not affected by the difference of detail which the demurrer points out."

In *Dennick v. Railroad Company*, 103 U. S., pages 17 and 18, Mr. Justice Miller says:

"It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right.

"Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

"The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the Circuit Court of the United States for the Northern District were competent to try such a case when the parties were properly before it (*Mostyn v. Fabrigas*, 1 Cowp., 161; *Rafael v. Verelst*, 2 W. Bl., 983, 1055; *McKenna v. Fisk*, 1 How., 241). We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey can not escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law, and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases. See *Ex parte Van Riper*, 20 Wend. (N. Y.), 614; *Lowry v. Inman*, 46 N. Y., 119; *Pickering v. Fisk*, 6 Vt., 102; *Railroad v. Sprayberry*, 8 Bax. (Tenn.), 341; *Great Western Railway Co. v. Miller*, 19 Mich., 305; *Stewart v. Railroad*, *supra*."

To the same effect are generally the decisions in both the federal and state courts of nearly all the states. Why, then, should it be said, as it is by some of the best text-writers, that Ohio is otherwise? We have no decision in this state justify-

1904.]

Mahoning County.

ing the claim, and we think if the question had been presented to our Supreme Court, its holding would have been the same as is generally held by the courts of other states.

We now come to the question as to whether or not the act of 1902, Section 6134a, deprives our courts of jurisdiction in such actions, except in cases where the death of a citizen of our own state is caused by the negligence or wrongful act complained of. The claim is that original Section 6134a, enacted in 1890, having given a right of action to all persons, whether citizens of the state or not, in our courts to enforce a claim under the statute of another state, and that section being repealed and a citizen of our own state being only specified in the amendment, that that presupposes that no such right previously existed and was only conferred by the statute of 1890, and that statute being amended and repealed, that it was the intention of the General Assembly to confine the right exclusively to persons who were citizens of Ohio when death ensued from such negligence in the foreign state.

The section as it was originally enacted is as follows:

“(Right by statute of other state, territory or country enforced.) Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state in all cases where such other state, territory or foreign country allows the enforcement in its courts of the statute of this state of a like character; but in no case shall the damages exceed the amount authorized to be recovered for a wrongful neglect or default in this state, causing death. Every action brought under this act where the death has already occurred shall be commenced within one year from the passage of this act; and in all other cases, within the time prescribed for the commencement of such action by the statute of such other state, territory or foreign country (91 V. 408).”

It will be observed that this section as it originally stood restricted the right to bring an action to a very narrow compass apparent from its reading, and the construction placed upon it in *Railroad Company v. Fox, Admr., supra*, makes the “fit exceedingly tight.” On pages 144 and 145, Spear, J., says:

“Nor is there ground for saying that our statute, Section 6134a, is satisfied by the mere entertaining by the courts of another state of a cause of action for death occurring in our state. Such is not the language of the law. It is not the entertaining of the suit that is stipulated for, but enforcement of our statute of like character. This means that it is the law of Ohio which the sister state will enforce; not necessarily the law of that state, for where there is an essential difference, as has already been pointed out, it can not be said by enforcing their own law the court of the other state is enforcing our statute. Our statute rests upon the ground of reciprocity which is based upon the idea of comity, and the very essence of reciprocity implies that each state, as to the subject matter, shall have and enforce identical laws; not simply provisions which may be in many respects similar, but in all essential particulars the same. It seems to us clear that the laws of Indiana, while they permit the bringing of actions in the courts of that state to recover for death occurring in another state, require the determination of the rights of the parties by the provisions of their own laws, but do not enforce the laws of the state where the injury was committed.”

Nearly all the statutes in the different states differ from each other; none of them are identical. In some of them the amount to be recovered is unlimited; in others the amount is specified; in some instances a small amount; in others a large amount; some provide the action shall be by an administrator for the benefit of a specified class; others provide that the suit shall be by the next of kin directly; in some of the statutes the beneficiaries are quite limited, being restricted to the immediate family; others extend to all the next of kin. In some states they provide how the negligent acts shall be proven, and what shall constitute negligence; in others it is left to the general rules of law upon the subject. If the statutes must be identical as was required by Section 6134a, as it originally was, then it would be almost impossible to maintain an action in this state under the statute of a foreign state. The decision was rendered in the case of *Railroad Company v. Fox, Admr.* (February 5, 1901), and at the next meeting of the General Assembly on May 6th, 1902, Section 6134a was amended as we now have it, and the original section repealed, which left the subject matter as

1904.]

Mahoning County.

it was previous to its enactment in 1890, subject only to the provision as it now exists.

The fact that so soon after this decision was made the section was amended would seem to be significant, and we are fully persuaded that the intention of the General Assembly was that the question should be left as it was before the statute was passed, all that was required being that the statutes of the different states should be substantially alike, and that if the foreign state substantially enforced our statute in accordance with the remedial provisions, that was all that was necessary, and in cases where the death of the citizen of our own state was caused by negligence or wrongful act, even that should not be required, but the next of kin might maintain an action in our courts under the statute of the foreign state independent of the question whether such foreign state enforced our statute or not.

There are many reasons why we feel constrained to place this construction upon Section 6134a as amended. The section does not provide directly, but, if at all, only by implication that in no other case but in that of the death of a citizen of our own state can such action be maintained, and it is a well settled rule of law that, "In giving construction to a provision of a statute which attempts to abrogate or modify a well established rule of the common law, the scope of the provision should not be extended beyond the plain import of the words used if reasonable effect can otherwise be given to it" (*Felix v. Griffiths*, 56 O. S., 39). If this rule would apply to a provision of the common law, much more would it apply in cases of this character where the right is so generally and specifically recognized in the different states.

Furthermore, such a construction would make the section directly inimical to Section 2 of Article IV of the Constitution of the United States which provides that "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Just what the words "privileges and immunities" signify it is difficult to tell under all circumstances, but their significance and import must be determined under the circumstances of each particular case; at the same

time there are well established rules which are recognized and given effect in all cases, and among these, it is well settled, is the right to the usual remedies for the collection of debts and the enforcement of other personal rights in the courts of all the states. Cooley's Constitutional Limitations, page 490 and cases cited in the notes.

True, the state may make reasonable restrictions so that its own citizens and courts will not be abused or imposed upon. It may provide that process in attachment and garnishment may be issued against a citizen of a foreign state, although not against a citizen of its own state; also that a citizen of a foreign state shall be required to give security for costs; these are reasonable provisions, but it can not close the doors of its courts absolutely to one class and give it to another, simply on the ground of citizenship of a different state. Such provision would be subversive of the entire theory of the union of the states, Cases cited in the notes in Cooley's Limitations, *supra*.

The construction contended for by defendant in error does not meet the question directly, but it is indeed more comprehensive and objectionable. If the death of a citizen of Pennsylvania is negligently caused, as in this case, in that state, his beneficiaries have no standing whatever in our courts, but if a citizen of Ohio is killed by the negligent act of another in that state, his beneficiaries may have complete redress in our courts without regard to their citizenship, whether they be citizens of a foreign state or of a foreign land. Certainly the General Assembly did not so intend, and we think such a construction is not required.

In addition to its evident unconstitutionality, such a construction would be shocking to courts in the administration of justice. A person might cause the death of another by the utmost recklessness in the state of Pennsylvania and have a large amount of property in Ohio; yet if the party killed was not a citizen of Ohio, the party guilty of the negligence could make this state his asylum, freed from all liability for his act, for the reason that our courts are closed against the injured parties.

There is another rule of law that should not be lost sight of, and that is a statute will not be held to be unconstitutional

1904.]

Mahoning County.

except the text of the statute absolutely demands it, "And where one of the two constructions renders a statute constitutional and the other renders it unconstitutional, the former, if reasonable, should be adopted." *Bobelya v. Friday*, Opinion, Burgett, J., 68 O. S., pages 386 and 387.

We see no necessity of so construing this section of the statute; as we have already said, it evidently means and the General Assembly must have so intended: That in cases wherein the death of a citizen of Ohio is caused by negligence or wrongful act in another state, that his next of kin shall have a right of action in the courts of our state under the statute of the foreign state, independent of the question whether such foreign state enforces our statute of a kindred nature or not; and as respects all other cases, the law is left as it was before the passage of the original act of 1890. That is, under the generally accepted rules of comity, where such state substantially enforces our statute, its statute will be enforced in this state. We see no substantial difference between the statute of Pennsylvania as pleaded and our own. It is true the parties entitled to recover are somewhat different and the amount to be recovered is unlimited. The action is instituted by the widow and children of the intestate who are the beneficiaries and the proper parties plaintiff under the statute of that state, and as they have invoked the laws of this state, they will be restricted to the amount that can be recovered in this state, and such is the prayer of the petition.

These distinctions are not important. *Dennick v. Railroad Company*; *Stewart v. Baltimore & Ohio Railroad Company*; *Wooden v. Western New York & Pennsylvania Railroad Company*; *Higgins v. Central New England Railroad Company*, *supra*.

Judgment is reversed and cause remanded with instructions to overrule the demurrer.

Anderson & Murray, for plaintiff in error.

Hine & Kennedy, for defendant in error.

QUESTIONS ON TRIAL FOR HOMICIDE.

[Circuit Court of Butler County.]

ALFRED A. KNAPP v. STATE OF OHIO.

Decided, January 5, 1904.

Oriminal Law—Extra Judicial Confessions—Must be Corroborated by Proof Aliunde Corpus Delicti—Admission of Confession of Other Crimes not Cured by Charge of the Court—Province of Jury Invaded by the Court.

1. It is a well settled rule that a conviction can not be had on an extra judicial confession by the defendant of the crime, unless the confession is corroborated by proof *aliunde corpus delicti*.
2. It is not necessary in an indictment for homicide for the state to set out the manner or means of the death, but where the manner and means are set out it is incumbent upon the state to prove the death substantially as alleged.
3. A confession of a number of crimes, including the one for which the defendant is on trial, is not rendered competent as a whole by an instruction from the court to the jury that only that part of the confession can be considered which relates to the crime under investigation.
4. A charge that "in all doubtful cases this presumption [of innocence] is sufficient to turn the scale in favor of the defendant," is erroneous in that it does not give the defendant the full benefit of reasonable doubt of his guilt.
5. The charge "sane men who are innocent as a rule do not make confession of crime," is erroneous for the reason that it is capable of more than one meaning, and in that it is an expression of experience as to the conduct and actions of men, and an invasion of the province of the jury.

SWING, J.; GIFFEN, J., and JELKE, J., concur.

The plaintiff in error prosecutes this action in this court to reverse the judgment of the Court of Common Pleas of Butler County, wherein he was found guilty of murder in the first degree for the killing of his wife, Hannah G. Knapp, on December 22, 1902.

The indictment charged said Knapp in the following language:

"Then and there unlawfully, purposely and of deliberate and premeditated malice, with his two hands did seize, grasp and

1904.]

Butler County.

press the neck and throat of her the said Hannah G. Knapp then and there, with his two hands aforesaid unlawfully, purposely and of deliberate and premeditated malice did choke and strangle with the intent her, the said Hannah G. Knapp unlawfully, purposely and of deliberate and premeditated malice to kill and murder of which said choking and strangling she the said Hannah G. Knapp then and there instantly died.”

In order to convict Knapp under this indictment, it devolved upon the state to prove that said Hannah G. Knapp came to her death in the manner set forth in the indictment.

The state produced evidence showing that the body of Hannah G. Knapp was found in the Ohio river, near New Albany, Indiana, about February 1, 1903; that she was last seen alive in company with Alfred A. Knapp, her husband, on the evening of December 21, 1902; that said Alfred A. Knapp was seen on the morning of December 22, 1902, with a box near the Miami river a short distance below the city of Hamilton; that he left Hamilton on that day and went to Cincinnati, Ohio; that he told conflicting stories about the absence of his wife; that he sold their household furniture and gave away her clothing; that shortly afterwards he went to Indianapolis, Indiana, and shortly after that married another woman; and the state introduced considerable other evidence tending to show that said Knapp knew that his wife would never return, and all of which evidence tended to show that said Knapp knew that his wife was dead and that he was in some way connected with her death.

After the discovery of the body of his wife Knapp was arrested in Indianapolis, Indiana, and brought to the city of Hamilton, where shortly afterwards he made a confession to Mayor Charles S. Bosch and the chief of police of said city, in whose custody he was at the time.

In this confession said Knapp confessed to having killed his wife in the manner set forth in the indictment, and that he had placed her body in a box and placed it in the Miami river below the city of Hamilton on the morning of December 22, shortly after he had killed her.

Does the confession of Knapp taken in connection with the other evidence sustain the conviction?

It is a well settled rule of law in this country that a conviction can not be had on the extrajudicial confession of the defendant unless corroborated by proof *aliunde* of the *corpus delicti*. 6 Am. & Eng. Enc. Law (2d Ed.), 582, and numerous authorities there cited, including *Blackburn v. State*, 23 Ohio St., 146.

The third proposition of the syllabus in this case is as follows:

“Although extrajudicial confessions alone are not sufficient to prove the body of the crime in cases of homicide, they may be taken and used for that purpose in connection with other evidence.”

The *corpus delicti* is thus defined:

“*Corpus delicti* is a term in criminal law, and means literally the body of the offense or crime charged.” 7 Am. & Eng. Enc. Law (2d Ed.), 861, and authorities there cited. Among which is *People v. Simonsen*, 107 Cal., 345 (40 Pac. Rep., 440), wherein the court says:

“The term ‘*corpus delicti*’ means exactly what it says. It involves the element of crime. Upon a charge of homicide, producing the body does not establish the *corpus delicti*. It would simply establish the *corpus*.”

In *Pitts v. State*, 43 Miss., 472, it is said:

“In felonious homicide it consists of two substantial fundamental facts; first, the fact of the death of the deceased, and, second, the fact of the existence of criminal agency as the cause of the death.”

In *People v. Palmer*, 109 N. Y., 110, 113 (16 N. E. Rep., 529, 530), the court says:

“A dead body is found with the skull mashed in upon the brain, under circumstances which exclude any inference of accident or suicide. There we have direct evidence of the death, and cogent and irresistible proof of the violence; the latter the cause and the former the effect; both obvious and certain, and establishing the existence of a criminal fact demanding an investigation. These facts proved, the *corpus delicti* is established.”

In 3 Greenleaf, Evidence (16th Ed.), Section 30, page 36, this is said:

“The proof of the charge in criminal causes involves the proof of two distinct propositions: First, that the act itself was done;

1904.]

Butler County.

and, secondly, that it was done by the person charged, and by none other."

A great number of authorities might be cited to the same effect.

Under the law as thus stated, the *corpus delicti* in this case would be the production of the dead body of said Hannah G. Knapp, together with facts which showed that she met her death by being choked or strangled to death.

The state has alleged that she came to her death in that way, and in order to sustain a conviction under the indictment these facts must be proved, and outside of Knapp's confession there must at least be facts which tend directly to prove them.

We have each of us gone over the evidence in this case very carefully, and we fail to find the least evidence outside of Knapp's confession that Hannah G. Knapp came to her death by being choked or strangled.

The dead body is found floating in the river. This simply proves the *corpus*; if there is any crime connected with the death, something else must be shown. How did the person die—by disease, accident, suicide, or violence; if by violence, what kind of violence—was she drowned; was she poisoned; was she shot; was she stabbed; was she beaten, or was she choked to death? As far as this body is concerned, this record fails to disclose a single item of evidence that this woman met her death by violence, in any manner whatever. No bullet hole, no cut, or stab, no fracture of bones or bruise on the body, and no poison in the stomach. As to how this person came to her death absolutely all is conjecture or surmise unless we look to Knapp's confession, and it is there alone that we find any evidence as to how this woman met her death. In other words, the crime of killing this woman by choking and strangling is shown only by Knapp's confession, and under all the authorities this is not enough; there must be some other evidence of the killing in the manner set out in the indictment with which the confession must be considered before conviction can be had.

It was not necessary for the state to allege the manner and means of the death of Hannah G. Knapp. An indictment could have been found against Knapp charging that said Hannah G. Knapp met her death at the hands of said Alfred A. Knapp by

manner and means unknown to the state. But having set out the manner and means of death, it was incumbent on the state to prove substantially the death as alleged.

It is claimed by plaintiff in error that the court erred in admitting in evidence a certain paper written by said Knapp. This paper is as follows:

“Confession of Alfred A. Knapp.

“On June 21, 1894, I killed Emma Littleman in a lumber yard in Gest street, Cincinnati. And on August 1, 1894, I killed Mary Eckert in Walnut street opposite the Y. M. C. A. building in Cincinnati. And August 7, 1894, I killed my wife Jennie Knapp under the canal bridge at Liberty street and threw her in the canal in Cincinnati. And in July, 1895, I killed Ada Gebhart in Indianapolis, Ind. And on December 22, 1902, I killed my wife Hannah Knapp at 339 South Fourth street in Hamilton, Ohio, and threw her in the river out by Lindenwald. This is true.

“ALFRED A. KNAPP.

“Hamilton, Ohio, Feb. 26, 1903.

“I make this statement by my own free will and not by the request of any officer or any one else.

“ALFRED A. KNAPP.”

This was signed by witnesses and sworn to before C. S. Bosch, mayor.

So much of said confession as relates to the killing of Hannah G. Knapp is admittedly competent, and all the rest of the so-called confession is admittedly incompetent.

The court also permitted the prosecuting attorney to read the whole of the confession to the jury, and also permitted the jury to take the same on retirement to consider their verdict.

On the receipt of the evidence and the reading of the same by the prosecutor, and allowing it to be taken by the jury, the court said to the jury that it was only offered for the purpose of proving the killing of Hannah G. Knapp, and on two of the occasions said to the jury that they were to disregard all portions of it which did not relate to the killing of Hannah G. Knapp; and

when the prosecutor read the paper to the jury the judge said to the jury that they should not permit the statements in said confession to prejudice them as they were only trying the defendant for the killing of Hannah G. Knapp.

In permitting this paper to go to the jury, and permitting the prosecutor to read it to the jury, and permitting the jury to take the same with them on retirement to consider of their verdict, we think the court erred.

It is a horrible, cold-blooded recitation of crime, having few equals in criminal history, and can scarcely be read by any one without producing the feeling that the man is insane or a fiend incarnate. How is it possible for any one having heard such a recitation of crime as this to disregard or not to be prejudiced by it?

The state had already proven two confessions by Knapp. But it is not shown that so much of this confession as relates to the killing of Hannah G. Knapp might not have been admitted without putting in the statements as to the other killings; the statement as to each of the other killings could very easily have been obliterated or cut out, and left intact that portion of the statement which was clearly competent.

There are also two errors assigned in the charge of the court that we desire briefly to refer to.

The court in its general charge made use of the following language:

"In all doubtful cases this presumption is sufficient to turn the scale in favor of the defendant."

Clearly this is not a correct statement of the law.

Every person charged with crime is presumed to be innocent, and unless the jury beyond a reasonable doubt find him guilty the defendant is entitled to be acquitted.

The court also charged the jury as follows:

"Sane men who are innocent, as a rule, do not make confession of crime."

It seems to us that this was erroneous in the court. The language itself, possibly, is capable of two or three different mean-

ings. The judge, in overruling the motion for a new trial, and commenting upon this portion of the charge says that immediately after he delivered the charge some bystanders spoke to him and put a meaning on it different from that which he intended. The defendant had already made confessions in this case, so that probably the meaning was that this man was either insane or guilty, from the fact alone that he had made the confessions, without taking into consideration any other question in regard to the *corpus delicti*, or anything that the evidence showed in that respect, which the jury is bound to consider. But, aside from the fact of making a statement which was inaccurate, and subject to be misconstrued, we have this objection to this portion of the charge, "sane men who are innocent, as a rule, do not make confession of crime;" we do not understand this to be a rule of law that a judge may charge the jury; but we take it, rather, that the judge is telling the jury what his experience of the actions of men is, and in that respect he usurped the power of the jury. It is not for the court to say to the jury what his experience of men in certain matters is; this is the exclusive province of the jury; it is their experience of the conduct and actions of men that is to be applied to the testimony in the case, and not that of the court. *State v. Tuttle*, 67 Ohio St., 440.

It seems to us, therefore, that the court erred in this particular portion of the charge.

There are a great many other grounds of error alleged in this case; we have considered them all, but we do not think that the points are well taken. Therefore, we find no other errors in the record other than those pointed out.

No doubt this fearful recitation of crime made by this man aroused a very strong feeling in this community against him; naturally it would; we can not help but feel that such is the case, and that this man is a criminal almost without parallel in the history of the law, certainly without any parallel in the history of this court; but this court can not change the law; we have to administer the law as we find it; we can not set ourselves up as to making one law for this man, and another law for another; we must administer the law as we find it and understand its meaning.

1904.]

Hamilton County.

For these reasons we think that a new trial must be granted to the defendant in this case.

Thomas H. Darby, for plaintiff in error.

Warren Gard, Prosecuting Attorney, for the defendant in error.

REPAIR OF A TURNPIKE AS REQUIRED BY ORDINANCE.

[Circuit Court of Hamilton County.]

THE VILLAGE OF MILFORD V. THE CINCINNATI, MILFORD & LOVELAND TRACTION COMPANY.

Decided, January 22, 1904.

Turnpike—Company in Default for Repair of—As Required by Its Franchise—Mandatory Injunction to Compel Repair—What Constitutes Repair.

1. While equity never decrees an ouster or forfeiture, a court of chancery may by mandatory injunction require performance of the conditions under which a corporation exercises its franchise.
2. "Repair" of a turnpike means a filling up of holes and an evening up of the surface in such a manner that the ordinary and expected travel of the locality may pass with reasonable ease and safety.

JELKE, J.; GIFFEN, J., and SWING, J., concur.

We find on the evidence that The Cincinnati, Columbus & Wooster Turnpike through the village of Milford is not in the condition of repair required by section third of the ordinance of August 4, 1903, and that The Cincinnati, Milford & Loveland Traction Company, defendant herein, is in default in this regard, and has failed in the performance of this condition of its franchise.

Injunction can not be resorted to, to work an ouster or to forfeit a franchise. Equity never decrees a forfeiture. A court of chancery may, however, by mandatory injunction or decree for specific performance require the performance of the conditions under which a corporation exercises a franchise.

The difficulty about such an order or decree in this case is

the continuing supervision which its enforcement would entail upon the court.

This objection only furnishes one more reason why a court of chancery should be slow to intervene, but is not a conclusive obstacle, and when public rights are involved a court of chancery will not shrink from the maintenance, through its duly appointed officer, of such continuing supervision necessary to preserve the rights of the public. See Note 1 on page 31, *Pomerooy on Contracts*, citing *Joy v. St. Louis*, 138 O. S., 1, and other cases. In the case at bar there is excuse for defendant's dereliction in that the weather has made it impossible to do this kind of work since Thanksgiving day.

There is also another reason why defendant should not at this time be enjoined in that it is under contract in its franchise to have its cars in operation by March 3d, 1904.

An injunction as prayed for will be denied, but under plaintiff's general prayer for equitable relief the court will order defendant company to put said road in the repair required by the ordinance, that is, "cause said turnpike to be put in repair from gutter to gutter with number two broken stone" by March 31, 1904.

There can be little or no sincere doubt as to what "repair" here means. It does not mean a new road made to a new grade, but it does mean a filling of all the holes and an evening up of the surface.

"To keep a street in repair is to have it in such state as that the ordinary and expected travel of the locality may pass with reasonable ease and safety" (75 N. Y., 231).

The condition of the ordinance is plain and defendant manifestly up to now has not lived up to it. Defendant is not expected to repair the damage caused by the water-works commission.

If defendant company can not understand what to do under the ordinance and the foregoing, the court will appoint its own supervising engineer to direct the work.

1904.]

Lucas County.

SALE OF OLEOMARGARINE AT RETAIL.

[Circuit Court of Lucas County.]

VERNON M. WILLIAMS v. THE STATE OF OHIO.*

Decided, March 1, 1902.

Oleomargarine—Statute Governing the Sale of as Butter—Proprietor of Store Responsible for Violation of by a Clerk—Notwithstanding Directions to the Clerk—Trial—Evidence.

1. Where an affidavit charges one with unlawfully selling oleomargarine, and the evidence shows that the sale was made by an employe who was authorized to sell the article, this is not a variance. It was not necessary to allege that the sale was made by an agent or employe. In misdemeanors all are principals.
2. In a prosecution for selling oleomargarine as butter, in violation of Section 4200-17, Revised Statutes, where the oleomargarine was sold by a clerk in the store of the accused, who was engaged in the business of selling oleomargarine to the public, with other merchandise, and who authorized its sale by his clerks, in the ordinary course of business, it is no defense that he had instructed such clerk and all of his clerks in the store not to sell oleomargarine, except under its true name and marked and labeled as required by said act; and testimony to prove such instructions was properly excluded.
3. One who engages in the business of selling oleomargarine to the public and permits and authorizes its sale by his clerks or employes, is bound to see that the law regulating its sale is complied with, and if it is violated by such employes or clerks, the employer is liable under the statute.

HULL, J.; HAYNES, J., concurs; PARKER, J., dissents.

The plaintiff in error was prosecuted under Section 4200-17 of the Revised Statutes, which is one of the sections providing against the sale of adulterated foods and drugs. This section prohibits the sale of oleomargarine except under its true name and when properly marked and stamped. The defendant was tried before a justice of the peace, or city judge of the city of Toledo as he is called, and a jury, and found guilty. A motion for a new trial was filed and overruled, and a fine of \$50 and

* Affirmed by the Supreme Court, without report, January 12, 1904.

costs was imposed upon the plaintiff in error. It was to reverse this judgment that proceedings in error were brought in the court of common pleas and in this court. The judgment of the justice of the peace was affirmed by the court of common pleas; and it is sought here to reverse the judgment of both courts below.

After providing in Section 4200-13 against manufacturing articles in imitation of butter and cheese, and in 4200-15 for a penalty, 4200-16 provides that:

“No person shall manufacture, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine, which contains any methly (methy) organe, butter yellow, annatto, analine dye, or any other coloring matter.”

Section 4200-17, under which this plaintiff in error was prosecuted, provides as follows:

“Every person who shall offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any oleomargarine, shall keep a white placard not less in size than ten by fourteen inches, in a conspicuous place where the same may be easily seen and read, in the store, room, stand, booth, vehicle or place where such substance is offered or exposed for sale, on which shall be printed in black letters, not less in size than one and one half inches square the words ‘oleomargarine sold here,’ and said placard shall not contain any other words than the ones described; and no person shall sell or deliver any oleomargarine unless it be done under its true name and each package has on the upper side thereof a label on which is printed in letters not less than five-eighths of an inch square the word ‘oleomargarine’ and in letters not less than one-eighth of an inch square the name and per cent. of each ingredient therein.”

The plaintiff in error was charged with a violation of the provision contained in the latter part of this section, which provides that “no person shall sell or deliver any oleomargarine, unless it be done under its true name, and each package has on the upper side thereof a label on which is printed,” etc. The affidavit charged the defendant below with selling oleomargarine personally; it did not charge that he did it through a clerk or agent, but simply charged that Williams—

1904.]

Lucas County.

“* * * did unlawfully sell to one Myra Heisey, also of said county of Lucas, a quantity of oleomargarine, the same being then and there a substance not pure butter, containing less than eighty (80) per cent. of butter fats, towit, eight and three hundredths (8.03) per cent. butter fats, which said substance was then and there made as a substitute for, in imitation of, and to be used as butter; that then and there said oleomargarine was not sold under its true name; but was then and there sold as, for, under and by the name of butter; contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.”

The evidence in the case showed that if a sale was made, it was made by a person in the employ of the plaintiff in error, and not by him personally; and it is claimed that this constitutes a variance between the evidence and the affidavit.

The offense provided for in this section is a misdemeanor, not a felony, and all parties to the commission of the offense are principals. In the case of *Anderson v. The State*, 22 O. St., 305 (an intoxicating liquor case), the indictment charged Anderson, the defendant below, with the sale of liquor personally; the evidence showed it was sold through an agent. On page 308 of the opinion the court say:

“Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offense, are either principals or accessories. In offenses less than felony, all are principals.”

In the case of *The State v. Basserman*, 54 Conn., 88, referring to a liquor statute, the court say:

“Under that statute a delivery by an agent is in all respects the same as a delivery by the vendor himself.”

Section 4200-17, makes no express provision for the sale through an agent or servant, as is done in some statutes; but simply provides generally that “no person shall sell or deliver,” etc. If the oleomargarine was sold by a clerk or employe of Mr. Williams, with his authority, the sale then would be made by him, the same as though he had made it personally, and, in our judgment, the affidavit is sufficient, and there was

no substantial variance. It was not necessary to allege that the sale was made through an agent. There is a common pleas decision in this state that holds otherwise; but there are no authorities cited in that decision, and the judge finally found that the evidence was not sufficient to warrant conviction in any event.

The chief question in this case is, whether, if the oleomargarine was sold by the authority of the defendant below, through a clerk, it would be a defense for him to show that he had given directions and instructions to this clerk, and to all of his clerks, not to sell oleomargarine except under its true name, and unless stamped and marked as required by law.

The defendant below offered to testify that he had given such directions; upon objection being made by the state, he was not permitted to do so, but the objection was sustained and the testimony excluded; and the case as finally submitted to the jury, under the charge of the court, excluded from their consideration anything of this kind. It is urged by counsel for the plaintiff in error that there can be no criminal intent, no conviction of a criminal offense of any kind, where the defendant himself has not been a party to the offense, where he has not knowingly committed any offense personally, and in this case it is claimed, and it was offered to show that he had given instructions to his employes not to sell the oleomargarine, except according to the provisions of this statute.

On the other hand, it is urged by the state that under a statute of this kind and similar statutes providing against the sale of adulterated foods and drugs, one who authorizes another to sell is bound to know that the law is being complied with by his agent and employe, and that it would have been no defense for Mr. Williams to show that he had given instructions—private instructions to his clerk not to sell oleomargarine except in accordance with the law—that if, in fact, it was sold from his store, sold there by his authority, he would be guilty of a violation of this statute, if sold contrary to its provisions by the clerk, notwithstanding his instructions.

Questions similar to this have arisen more often perhaps in prosecutions under statutes providing against the sale of in-

1904.]

Lucas County.

toxicating liquors than in any other class of cases; but the Supreme Court of this state has had before it some cases arising under the food laws, where they have laid down certain principles, which we think control this case, although no case exactly like this has been before the Supreme Court.

In the case of *The State v. Kelly*, 54 O. S., 166, the defendant was charged with selling adulterated food; he sought to show in his defense that he had no knowledge that the food was adulterated, but believed it to be pure, and sold it in good faith; and in the trial before the justice of the peace, this instruction was requested—

“While it is not necessary to charge knowledge in the affidavit, want of knowledge and absence of intent is a valid defense. You will carefully weigh the evidence of all the witnesses, and if the evidence discloses that the defendant bought the molasses he is charged here with selling for pure New Orleans molasses and honestly believed it to be such, that still believing it to be pure he sold it as such without intent to deceive the purchaser thereof as to its true character, you must acquit the prisoner.”

This instruction was refused and upon Kelly's conviction the case was taken on error to the common pleas court and the judgment reversed there and the case went to the Supreme Court on exception to the reversal, and the exception was sustained. The Supreme Court say in the syllabus of the case:

“1. An affidavit to charge a violation of the act of March 20, 1884, Section 8805 (Giauque's Revised Statutes), ‘to provide against the adulteration of food and drugs,’ need not charge that an adulterated article of food is sold to be used as human food.

“2. In a prosecution under said act, it is not a defense that the accused is ignorant of the adulteration of the article which he sells or offers for sale.”

Judge Shauck, in delivering the opinion of the court said:

“The first section of the act of March 20, 1884 (Section 8805, Revised Statutes), provides ‘that no person shall within this state manufacture for sale, offer for sale, or sell any drug or article of food which is adulterated, within the meaning of this act.’ Other provisions of the statute are devoted to definition

of the terms used in the first section, and to prescribing penalties for the violation of the act. It is not doubted that molasses to which glucose has been added is an article of adulterated food within the meaning of this statute.

“The act does not in terms require, to constitute an offense against its provisions, that the adulterated articles of food shall be sold to be used by the purchaser as human food. Nor does it in terms require, as an element of the offense, knowledge of the fact that the article is adulterated, or provide that a want of such knowledge shall constitute a defense. Both conclusions stated in the decision of the court of common pleas are, therefore, wrong, unless there are justifiable inferences from the purpose and indicated policy of the act.

“The act is not a provision for the punishment of those who sell adulterated food or drugs, because of any supposed turpitude prompting such sales or indicated by them. Its purpose is indicated by its title. It is ‘an act to provide against the adulteration of food and drugs.’ It is a plan devised by the General Assembly to protect the public against the hurtful consequences of the sales of adulterated food and drugs, those consequences being in no degree increased by the vendor’s knowledge, or diminished by his ignorance, of the adulteration of the articles which he offers for sale. The provisions of the act are appropriate to the purpose, indicated by its title. It would have been inconsistent with that purpose to provide for the trial of such immaterial issues as the object of the vendor in making a sale or of the extent of his knowledge touching the quality of the article sold. Those who produce the adulterated articles whose sale is forbidden may live without the state. Purpose and knowledge, except when they are indicated by the character of the forbidden act, are, in most cases, insusceptible of proof. If this statute had imposed upon the state the burden of proving the purpose of the vendor in selling an article of food or his knowledge of its adulteration, it would thereby have defeated its declared purpose. Since it is the duty of courts to so construe doubtful statutes as to give effect to the purpose of the Legislature, they can not in case of a statute whose provisions are unambiguous and whose validity is clear, defeat its purpose by construction.

“The correct view of statutes of this general nature is stated by the Supreme Court of Massachusetts in *Commonwealth v. Murphy*, 42 N. E. R., 404: ‘Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question

in interpreting a criminal statute is whether the intention of the Legislature was to make knowledge of the facts an essential element of the offense, or to put upon everyone the burden of finding out whether his contemplated act is prohibited, and of refraining from it, if it is.' "

In the last paragraph of the opinion Judge Shauck says:

"In the enactment of this statute it was the evident purpose of the General Assembly to protect the public against the harmful consequences of the sales of adulterated food and drugs, and, to the end that its purpose might not be defeated, to require the seller at his peril to know that the article which he offers for sale is not adulterated, or to demand of those from whom he purchases indemnity against the penalties that may be imposed upon him because of their concealment of the adulteration of the articles."

The doctrine of this case, at first blush, might seem to be in conflict with the general principles of criminal law—that one might be convicted of an offense where he had no criminal intent or purpose and no knowledge at the time that he was violating a law. But the rule seems to be, as laid down by the Supreme Court, that one who sells food is bound to know that he is not violating these statutes for the protection of the public against the adulterating of foods, and as the court say in the concluding paragraph, it was the purpose of the General Assembly to require the seller at his peril to know that the article which he offers for sale is not adulterated.

But this doctrine of our Supreme Court was by no means a new doctrine, and it has been so held in many states. In the case of *Commonwealth v. Savery*, 145 Mass., 212, it is said:

"It is no defense to a complaint for keeping intoxicating liquors with intent unlawfully to sell the same, that the liquors were upon the defendant's premises by mistake, and he did not know they were intoxicating, if he intended to sell them, and they were in fact intoxicating."

In this case the defendant was a liquor seller; he was not permitted under the statute of Massachusetts to sell beer containing more than three per cent. of alcohol. It is claimed that he sold by mistake beer containing more than three per cent.

of alcohol, without knowledge that it contained more alcohol than the statute permitted; but the Supreme Court of Massachusetts held that that was no defense, he was bound to know it, "at his peril."

The case of *Commonwealth v. Wentworth*, 188 Mass., 441, is a case where a man was prosecuted for keeping for sale naphtha under a false name. His defense was that he did not know that the article which he had was naphtha, he supposed that it had none of the dangerous qualities of naphtha; but the court said in that case:

"We are of opinion that the court correctly ruled, that the question whether the defendant had knowledge that the articles kept by him was naphtha was immaterial. The statute does not make a guilty knowledge one of the ingredients of the offense. It is like the statutes against the sale of intoxicating liquors, or adulterated milk, and many other police regulations; it prohibits the acts of selling or keeping for sale naphtha under any name, not because of their moral turpitude, or the criminal intent with which they are committed, but because they are dangerous to the public."

The case of *Commonwealth v. Farren*, 9 Allen, 489, was a milk case. The Supreme Court of Massachusetts in that case say:

"A person may be convicted of selling adulterated milk, under St. 1864, C. 122, Section 4, although he did not know it to be adulterated, and an averment in the indictment that he had such knowledge may be rejected as surplusage."

The State v. Hartfield, 24 Wis., 60, was an intoxicating liquor case, and is perhaps in conflict with some of the former decisions of our own Supreme Court in cases of selling intoxicating liquors to a minor. The Supreme Court of Wisconsin holds:

"The sale of intoxicating liquors to a minor is an offense under Section 1, Ch. 128, Laws of 1867, though the vendor does not know that the purchaser is a minor."

The evidence in the case was that the defendant inquired of the purchaser his age, and it was represented that the person was of full age; he was in fact six feet and one inch in height, and defendant believed in good faith that he was of age. But

the Supreme Court of Wisconsin held that was no defense; that he was bound to know.

It is urged that to hold here that Mr. Williams might be convicted although he had given directions to his clerk not to sell except in accordance with the law, would be contrary to the former decisions of the Supreme Court of this state, especially in liquor cases, and particularly a case in the 22d O. St., where it was held by the Supreme Court that that constituted a defense in case of selling liquor. The Supreme Court, however, in the case of *The State v. Kelly*, 54 O. St., 166, seem to have had no difficulty in discriminating between the rules that had been laid down in liquor cases and the rules that ought to be laid down in the case of selling adulterated food. There is this to be said in liquor cases the law provides that the penalty for a violation of the statutes may be imprisonment, as well as a fine, and a violation of the food statute is punishable by a fine only. It provides that whoever violates any one of the provisions of the statute shall pay a fine of \$50. Whether that makes any difference in the rule it is not necessary to determine. The Supreme Court, however, in the case in the 54th O. St., hold clearly and positively that lack of knowledge is no defense in a prosecution under this statute for selling adulterated food; and that was as much in conflict with the former holdings of the Supreme Court upon that question in liquor cases, if there is any conflict, as it would be to hold that a vendor of oleomargarine, who sold it through his clerk, contrary to his instructions, would be liable under this statute, if the clerk did not comply with the law. The Supreme Court has held in many cases of selling intoxicating liquor that want of knowledge is a defense, tracing the doctrine back to the old case in the 8th Ohio, page 230 (*Birney v. The State of Ohio*), where a person was prosecuted for concealing a slave, and his defense was that he did not know that the mulatto was a slave.

In the case of *Miller v. The State* in the 3d O. St., 476, the Supreme Court held in a liquor case, in the syllabus as follows:

“To convict of a violation of the second section, it is necessary to aver in the information and prove on the trial that the seller knew the buyer to be a minor; and to convict of a

violation of the third section, it is necessary to aver and to prove, in like manner, that the seller knew the buyer to be intoxicated, or in the habit of getting intoxicated."

The case of *Crabtree v. The State*, 30 O. St., 382, was another case of selling to a minor, where it was held that want of knowledge was a defense. This is in the syllabus:

"In prosecutions under Section 3 of the act 'to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio' defendant may show, to rebut proof of knowledge, by his own and other persons' testimony, that shortly prior to the time of the alleged unlawful sale he made inquiry of persons well acquainted with the person charged in the indictment as a person in the habit of getting intoxicated; and also show what information he obtained from such persons. His good faith and due care in seeking and obtaining such information, as well as the proper effect thereof under all the circumstances, are to be left with the jury."

On page 387 of the opinion, the court quotes from Mr. Bishop as follows:

" 'And when this good faith and this due care do exist, and there is no fault or carelessness of any kind, and what is done is such as would be proper and just were the fact what it is thus honestly believed to be, there is no principle known to our criminal jurisprudence by which this morally innocent person can be condemned because of the existence of a fact which he did not know and could not ascertain. On the other hand, to condemn him would be to violate those principles which constitute the very foundation of our criminal jurisprudence. Honest error of a fact is as universal an excuse for what would be otherwise a criminal act as insanity.' "

And in the case of *Farrell v. The State*, 32 O. St., 456, a liquor case, a man was charged with selling intoxicating liquor, and his defense was that he did not know it was intoxicating liquor, that he bought it under the name of bitters, supposing it was a harmless compound, and that it contained no alcohol, it was so represented and sold to him, he kept it honestly and sold it honestly believing it to be non-intoxicating, just as in the 54th O. St., the party sold the food, believing it to be pure; and the Supreme Court held in that case that that would be a

good defense; the second paragraph of the syllabus is as follows:

“A person indicted for selling intoxicating liquors, in violation of the provisions of Section 1 of the act to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio, may, on the trial, show that at the time he bought the articles it was represented to him to be free from alcoholic properties—that he bought it with the understanding and believing that it was not intoxicating liquor, and sold it with such understanding and belief.”

The question is discussed at some length. In the opinion the court say:

“The accused interposed two defenses—first, that the bitters sold was free from alcoholic properties; and, second, that if the bitters did, in fact, contain alcohol, and was intoxicating by reason thereof, he was wholly ignorant of such fact; that he bought the bitters upon information and in the belief that the bitters was free from alcoholic properties, and sold it free from all intention of violating the statute.”

And further on page 460:

“We are unable to see why the proposed testimony was not competent. The accused’s intention at the time of the sale was involved in the issue. It was competent to show that, from the circumstances of the case, he was free from culpable purpose, and one of the circumstances tending to show freedom from guilty intention in the sale was the fact, if fact it proved to be, that he bought the bitters under the information and belief that it was an article free from alcoholic properties; that he sold it honestly believing, from information obtained at the time of the purchase, that it was not an intoxicating liquor. We think the testimony would have tended to show good faith and want of guilty intention on the part of the accused.”

I have called attention to these former decisions of the Supreme Court for the purpose of showing that when they came to construe and interpret this food law in the 54th O. St. they did not apply those rules, nor any such principles as are laid down in the last case from which I have read. But they held that under the statute which prohibits the sale of adulterated food or drugs, the seller of such articles sold them at his peril, and that the burden was upon him to ascertain whether they

were pure or not; although in the case just cited, 32 O. St., 456, the court held that it constituted a good defense in a liquor case for the vendor to show that he did not know that the article he was selling was intoxicating liquor. The liquor case in the 22d O. St., p. 5, it is urged should control this case. The syllabus of that case is as follows:

“Where, in a prosecution for unlawfully selling intoxicating liquor, it appears by the evidence for the state that the sale was made by the agent of the defendant in charge of the establishment where the liquor was sold, it is competent for the defendant to rebut the presumption of *prima facie* agency, which the evidence makes against him, by showing that the sale was, in fact, made without his authority and against his directions.

“2. But the directions to the agent, forbidding the sale, must be in good faith; for however notorious or formal they may be they can have no effect, if they are merely colorable. The fact of agency is to be determined by the *real understanding* between the principal and agent.”

And in the opinion on page 308, the court say:

“The rule as to the conclusive effect of the *prima facie* or apparent authority of an agent ought not to be applied to the enforcement of a criminal statute where such statute is fairly susceptible of a different construction. The accused, in such case, has the right to rebut the presumption of *prima facie* agency, which the evidence makes against him, by showing, if he can, that the criminal act was, in fact, committed without his authority and against his instructions.”

To hold that Williams was liable for what his clerk did contrary to instructions would appear perhaps to be in conflict with this decision; but it seems to us that it would be no more in conflict with the holding in that case than the decision of the Supreme Court in the 54th O. St. was with some of the former decisions in liquor cases. But the Supreme Court decided that case without citing or attempting to reconcile the decision with the former decisions of the court in liquor cases. They there laid down the broad doctrine that these food statutes are for the protection of the public, and that it is wholly immaterial to the public whether the seller had knowledge that the food was adulterated or not. The statute does not provide

1904.]

Lucas County.

against one willfully and knowingly selling adulterated food, but it provides absolutely against its sale, and the Supreme Court say that the question of knowledge is immaterial and suggest that to hold otherwise would interfere very materially with the practical enforcement of the statute and say that a court ought, where it can do so, to construe and interpret a statute in such a way that it may be enforced in a manner to carry out the purpose and object of the Legislature.

I will refer to another case which tends to support the contention of the plaintiff in error (*Barnes v. State*, 19 Conn., 397), in which the court say:

“Where it appeared in such prosecution that the sale complained of was made by the clerks of the defendant, and he offered evidence to show that he had given such clerks specific directions to sell no liquors to common drunkards, it was held that such evidence was admissible.”

I will say that this was also an intoxicating liquor case. It was decided by a divided court, two judges of the five, Chief Justice Church and Judge Waite, dissenting from that proposition of the syllabus.

The record in the case at bar shows that Mrs. Hisey, the purchaser of this article, went into Mr. Williams' store, called “the Adams Street Butter Market,” one evening between 9 and 10 o'clock; she found a young man behind the counter, dressed as a clerk, with a large apron on; she called for a pound of butter; he went back into the room to a large refrigerator, or some such apartment, and brought out a roll of something that looked like butter. It was a trifle over a pound, very little, and he charged her thirty cents for it. The price of oleomargarine at that time was but fifteen cents a pound. It was not stamped nor marked, but was sold to her as butter. The evidence in the case further shows that the oleomargarine was colored to look like butter, in violation of another section of the food laws. This young man was selling goods in the ordinary way. The next morning she undertook to use some of the commodity she had purchased and discovered it was not butter, but oleomargarine. She thereupon complained to the authorities, and the deputy commissioner of the dairy and food department went to

the store a few days later, and this same young man was found behind the counter selling goods. The analysis of the article showed that it contained eight per cent. of butter fats, instead of eighty per cent., as required by law.

The defendant testified that this young man had no authority to sell anything. This question, with the other questions of fact, was left to the jury; and there was ample evidence to warrant the jury in finding that he did have authority to sell. The defendant admitted upon the witness stand that he did not reprimand the young man for selling Mrs. Hisey oleomargarine upon the occasion in question; he said that he had a cashier and perhaps one more clerk besides this young man, and offered to show that he had given them all instructions not to sell oleomargarine except in accordance with the statute. This evidence was excluded. Mr. Williams' testimony sheds some light on the way this business was carried on, or was in this particular case, at least. According to his testimony, he purchased this oleomargarine from another person under a contract that the dealer from whom he purchased it would pay all fines and costs that might be imposed upon Mr. Williams and employ counsel for him in case of trouble, and defend any prosecutions that were commenced against him. While that perhaps does not shed very much light on the question involved here, it indicates that it was contemplated by the parties that there would probably be criminal prosecutions. The evidence shows, as I have suggested, that the oleomargarine was colored so as to look like butter.

The question is, whether, if it were shown that Williams had given private instructions to his clerks not to sell oleomargarine except according to law, that would constitute a defense. A majority of the court are of the opinion that it would not, and that this testimony offered was properly excluded. If this oleomargarine was sold by a duly authorized clerk, it was a sale by Mr. Williams, as much as if it had been sold by him. He was engaged in the oleomargarine business, although his place of business was called a "butter market." He knew, of course was bound to know, what the provisions of this statute were. We think that this case is within the principles laid down by the Supreme Court in the Kelly case, 54 O. St., 166.

When a man offers oleomargarine for sale in his store in the open market, along with butter, or otherwise—an adulterated article of food, the sale of which is prohibited, except upon certain conditions—the duty is imposed upon him to see that the laws of the state are complied with. He may sell it and attend to the matter of sale himself, if he sees fit; but if he prefers to leave it to clerks or others whom he employs, he does so at his peril; and if the provisions of these sections of the statute are violated, he must suffer the penalty imposed by law. These provisions are in the nature of police regulations, as the Supreme Court has said, for the protection of the public. This statute should be so construed by the courts as to admit of its practical enforcement. To hold that by private instructions to a clerk a person in the oleomargarine business might escape prosecution or punishment, would go a long way, it seems to us, toward destroying the beneficial effects and purposes of this law. In many cases such goods are ordered by telephone, and the clerk is not seen; there is no way of identifying him. We think it is not imposing an extraordinary hardship upon one who engages in selling adulterated food, to require him to see, at his peril, that the law of the state is complied with. Where the article is sold by his authority, it is not like a case where a party has prohibited his clerks from selling the article at all, or where the clerk without any authority has sold the article, or where some one has come into his store without authority and sold the article. But here is a case where the party is engaged in the business of selling, where he intends to sell it, and where his clerks are authorized and employed to sell it.

A paragraph from Greenleaf on Evidence, we think is in point (Vol. 3, p. 21); I will read a portion of it:

“But where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is

also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know the facts and to obey the law at his peril."

We think in holding as we do, we are following the principles and spirit of the case in the 54th O. St. In the absence of a decision directly in point, we are of the opinion it ought to be the law, and we hold it to be the law, that where one engages in a business of this kind, he does it at his peril, and that the duty is imposed upon him to *know* that those whom he employs to sell this article to the public obey the law in the manner of selling it, and in case they do not, that he, as the principal and proprietor of the establishment, is liable to pay the penalty assessed by the statute. We feel that any other holding would practically destroy this statute and thwart the object and purpose that the Legislature had in view. We believe it to be a wholesome law and that it should be construed so that it may be enforced.

The judgment will be affirmed.

Chittenden & Chittenden, for plaintiff in error.

Walter Brown, for defendant in error.

PARKER, J., dissenting.

As indicated in the opinion delivered by my associate, we are not in accord on one proposition involved in this case. The defense, or one of the defenses attempted to be established by the evidence was fairly stated by Judge Hull. The defendant undertook to show that he had, in good faith, instructed all of his employes that they were not to sell oleomargarine, except it were first stamped or labeled as required by the statute, and that this sale was made by one of his employes authorized to make sales, but that he was in ignorance of the fact, and, so far as he was concerned, it was in violation of his will and his express instructions.

Now it will be noted that this prosecution here is not for adulterating food, but for selling oleomargarine without stamp-

1904.]

Lucas County.

ing it or labeling it, as required by law; and it will be remembered that it is not unlawful in Ohio to sell unadulterated oleomargarine; that it is quite as lawful, providing the regulation as to stamping it is observed, to sell oleomargarine as it is to sell sugar, silks or cotton, or other merchandise. There is certainly by the law no more inhibition against or disfavor shown to the keeping for sale and selling of this article than there is the keeping for sale and selling of intoxicating liquors. The penalties for unlawful sales are not so heavy. Nevertheless, it is made a crime to sell oleomargarine, unless the label is put upon the package. It is not made a crime to keep it without a label upon it, but it is made a crime to sell it without labeling it. Therefore, the vendor may lawfully keep it in his possession, with the purpose of selling it, and that does not thereby violate the law. He need not label it until he comes to make the sale; and, therefore, he may keep it in bulk, as I take it from the evidence was done in this case; so that when a person applies to buy, such quantities may be sold, whether a pound, two pounds, or more or less, as the person applying for the article desires; and after the package is made up of the quantity desired, before it goes out of the possession of the seller, it must be labeled.

It seems to me that the principle laid down in the case of *The State v. Kelly*, 54 Ohio St., 166, does not reach this case, for an entirely different principle is there involved; and it is significant (though my associates seem to think that the court there was departing from principles announced in well considered cases that have stood the test of years and are the settled law of the state) that the court there does not refer to any of those cases, does not criticize them, does not reflect upon them or indicate any purpose to depart from them at all; and, in my opinion, it was not the purpose of the court to do so, and the court has not done so, but the decision in the case of *The State v. Kelly, supra*, is entirely consistent with the principles of the criminal law theretofore announced by the Supreme Court in the cases referred to by my brother in stating his views of this case. In this case, we have not, as we have in *State v. Kelly, supra*, a question of *scienter*, or guilty knowledge; neither have we a case presenting a

question of the purpose with which the goods were sold. But we have simply the question: Did the defendant do the act? The defense, as I understand it, goes to that question. The defendant undertakes to show that he did not do the act. Of course it would not be sufficient to show that he had simply given secret instructions to the clerk; nor would it be sufficient to show that he had given public and notorious instructions to the clerk not to sell unless he observed the law. The defendant must convince the jury that he has, in good faith, forbidden and tried to prevent sales, except as authorized by law. The jury must so find, in order that the defendant shall be exonerated, and that the defendant here undertook to prove, but he was not permitted to do it. We have simply the question whether the defendant had a right to undertake to show, as indicating his innocence, that he had, in good faith, instructed his clerks to not sell this article, except when labeled according to law; whether he had a right to offer evidence to prove that he had, in good faith, forbidden them to sell it otherwise. Therefore I feel that I am not called upon to express any opinion upon what the evidence indicates as to the real knowledge or purpose of the defendant in the case upon this point and issue, which was not permitted to go to the jury.

We have all looked for authorities with considerable diligence along this line of agency; we have found some which seem to me to be directly in point; we have found none except such as hold that if the defendant shows that he has in good faith instructed or directed his agents, and they violated the law in opposition to his will, he can not be convicted. In other words, that where there is another free moral agent intervening to defeat his will and purpose, and that other free moral agent does the act, it is not the act of the defendant, and to punish the defendant is to punish him for the act of another; a result which, I declare, with all due respect for those from whom I differ, seems to me to be obnoxious and abhorrent to the sense of justice of the average man. I read from Bishop's New Criminal Law, Section 218:

“By general doctrine, it is no crime for a man to employ a servant in a lawful business; and, if the servant commits a

1904.]

Lucas County.

crime therein, the master is not liable. But we shall see further on that the master may be so careless in selecting his servant as to become answerable criminally for acts done in the service. And it appears from some of the older books that a sheriff is indictable for a mere negligent escape suffered by a deputy; for example, his jailor; because he 'ought to put in such a jailor as for whom he will be answerable.' But we may doubt whether in this sort of a case the doctrine of responsibility would be carried so far now, in the absence of special circumstances; and it seems in a general way to be settled that he can not be held criminally for the conduct of his deputy, though he may be liable in proceeding *quasi* criminally, for the enforcement of civil rights. Further to illustrate, * * * "Section 219. In Liquor Selling.—Under the statutes forbidding the sale of intoxicating drinks without license, and the former ones against selling goods to slaves without the consent of their masters, it is sufficient in defense that the sale was made by the defendant's clerk, unauthorized either absolutely or by implication. And it is the same though the statutory words are 'by agent or otherwise.' Still we have cases in liquor selling which carry the liability of the employer very far."

Cases are there cited, to some of which I will refer briefly; the case of *Hipp v. The State*, 5 Blackford, 149, Supreme Court of Indiana. The syllabus of that case is as follows:

"The general rule is, that a master is liable in a *civil suit* for the negligence or unskillfulness of his servant, when he is acting in the employment of his master; but that he is not subject to be punished by indictment for the offenses of his servant, unless they were committed by his command or with his assent."

In the case of *The State v. Dawson*, 2 Bays, 360, the Supreme Court of South Carolina holds:

"Upon an indictment for trading with a negro, with a ticket from his master or person in whose charge he was, contrary to the act of the Legislature in such case provided. Verdict: Guilty. Motion for a new trial.

"On the trial of this case at Georgetown, it appeared that the defendant kept a small retail store in the neighborhood, and that the prosecutor's negro had been seen carrying corn to this store, and *delivering it to a clerk*, who had the care of the store.

"The Attorney-General then contended that the evidence had brought the defendant clearly within the meaning of the act,

which declares 'that if any shopkeeper, trader, or other person, shall at any time after the passing of the act, by himself *or any other person*, directly or indirectly, buy or purchase from any slave in *this* state any corn, rice, peas, or other grain, bacon, flour, tobacco, cotton, indigo, blades, or any other articles whatsoever, or shall deal, trade or traffic with any slave whatever, not having a ticket or permit so to deal, trade or traffic, or to sell any such article, from the master or owner of such slave, or such other person as may have the care and management of such slave, every such person, shopkeeper and trader shall, for every such offense, forfeit a sum not exceeding two hundred dollars, to be recovered by bill, plaint or indictment, one half to the informer, and the other moiety to the state, in any court of competent jurisdiction in the same.

"The Attorney-General then argued, that, although the evidence had not proved that the defendant himself had received the corn, yet it was delivered to his clerk or storekeeper, who was defendant's agent, and therefore it was presumable he had defendant's orders for it, and consequently that he was chargeable under this indictment."

Then the arguments upon the other side are given.

"The presiding judge (Waites) told the jury that he thought the evidence not sufficiently strong to convict the defendant, without some knowledge of the fact had been brought home to him, or some general order or direction had been proved to have been given to his clerk for that purpose."

The verdict was guilty, and the *per curiam* is as follows:

"There ought to be a new trial in this case, as there is no knowledge of this fact brought home to the defendant, nor any general directions proved against him; and, although the prosecution might be maintained against the clerk who received the corn, yet there is no proof to charge the defendant, as was very properly laid down by the presiding judge on the trial."

Another case that has been referred to and commented upon somewhat by my associate is that of *Barnes v. State*, 19 Conn., 398. I again call attention to that case, because it is a case that seems to be cited in the text books generally and a case which seems to have received the approval of law writers and of courts, and especially because it has received the express approval of the Supreme Court of the state of Ohio in the case of

1904.]

Lucas County.

Anderson v. The State, in the 22d Ohio St., 305; and in this connection I mention a fact to which my attention had not been drawn until my associate began or was in the course of the delivery of the opinion here, namely, that notwithstanding it is evident that in the state of Massachusetts, ignorance of the quality of the liquor sold—that is to say, as to its alcoholic or intoxicating quality—is no defense, yet it is distinctly held in the state of Massachusetts, as being entirely consistent with that doctrine, that it is a defense to show that the act was done by an agent and in opposition of the will or direction of the employer; so that I think the two doctrines are not at all obnoxious, the one to the other. Now the syllabus of this case has already been read, and I desire to read briefly from the discussion by Ellsworth, Judge, and while it has been indicated that there was a dissenting opinion, that which is approved by the Supreme Court of Ohio is the opinion of the majority, and not the dissenting opinion. I read from *Barnes v. State*, *supra*, 405:

“But in another ruling of the court we are constrained to say that there is error. The accused (a statute witness) was offered to testify that the sale was made without his consent, and contrary to positive instructions given to his clerk, by whom the sale was made, if made at all. The accused insists that the word ‘agent’ shall be taken in its common acceptance; that the relation of principal and agent is a matter of *fact* to be left to the jury, and not an inference of law for the court. If he is right, the testimony should have been received, as conducing to prove there was no agency in fact. The true inquiry, then, is, what does the statute mean by the term ‘agent?’ A just interpretation must be our guide. If construed either way, it will not, we think, exceed the power of the Legislature, though we should be induced, from necessity only, to put upon a common word an uncommon and technical meaning, particularly in the construction of a penal statute. It certainly does not mean that a person is another’s agent in every transaction, because he sustains towards him that general relation. Nor does it mean every one who professes to represent another; nor every one who acts as clerk of another in his shop, or office, or business; nor every one who sells liquor on his employer’s premises, without, and contrary to, his instructions. Obviously courts can attach no other than the usual meaning to the word ‘agent,’ unless unequivocally forced to by it, the clear language or con-

struction of the statute. An agent is an actual *bona fide* representative of his principal, in the particular transaction, with his consent or concurrence. What shall be sufficient evidence of it in any case does not belong to the present inquiry; the relation must be made out by proof, more or less particular, according to the circumstances. We speak only of criminal cases, for we admit that in civil matters, to prevent imposition or fraud, the relation of principal and agent is assumed by courts to exist where it does not, in truth, exist. We are confident this statute has not introduced a new principle of law into our criminal code; but this word 'agent' is used in order to guard against a too technical construction of a criminal statute; a caution not really needed in this case, but very natural with such men as make our laws.

"Besides, it must be remembered, that selling spiritous liquor is, generally, a *lawful* business; it becomes unlawful only in particular cases. A grocer, a druggist, a physician, may sell it for medicinal purposes, and for other purposes if it is not to be drunk on the premises, and is not sold to common drunkards and persons addicted to habits of intoxication. Within these limits, he may direct his clerk, student or servant to act for him, and forbid him to go further. The sincerity of the order must be judged of by the jury; it *may be sincere* and proper, and might have been in this case; at any rate, we can not say, that *per se* it *must* have been otherwise.

"In *Commonwealth v. Nichols*, 51 Mass. (10 Metc.), 259, 262, 263, the Supreme Court of Massachusetts, in a prosecution on their statute for selling spirituous liquors, hold this language: 'We think that a sale by a servant, in the shop of the master, is only *prima facie* evidence of such sale by the master as would subject him to the penalty for violating the statute forbidding the sale of spirituous liquors without license; that the relation of these parties; the fact that defendant was in possession of the shop, and was the owner of the liquor, and that the sale was made by his servant, furnish strong evidence to authorize and require the jury to find the defendant guilty. But we can not say that no possible case can arise in which the inference from all these facts may not be rebutted by proofs; unexplained, they would be sufficient to convict the party. So, too, it should be understood, that merely colorable dissent, or a prohibition not to sell, however, publicly or frequently repeated, if not made *bona fide*, will not avail. But if a sale of liquor is made by the servant, without the knowledge of the master, and really in opposition to his will, and in no way participated in, approved or countenanced by him, and this is clearly shown by the master, he ought to be acquitted.' "

1904.]

Lucas County.

The case contains some further discussion and citation of authorities.

Now the language of the Supreme Court of Ohio in the case of *Anderson v. The State*, 22 Ohio St., 305, is very much like that used in these cases, and *Barnes v. The State*, *supra*, and *Commonwealth v. Nichols*, 51 Mass. (10 Metc.), 259, are cited with approval by the Supreme Court of Ohio in that case. In *Anderson v. State*, *supra*, the statute which the Supreme Court had under consideration used the language "whoever sells by agent or otherwise," and Chief-Justice White says:

"To bring the person within the operation of the act, the elements which constitute the offense must attach to him. *He* must make the sale. It is immaterial whether he does it directly or indirectly. The object in using the phrase, 'by agent or otherwise' was to show expressly and unequivocally that the act was intended to embrace every means that the person charged might employ in effecting the illegal sale.

"The rule as to the conclusive effect of the *prima facie* or apparent authority of an agent ought not to be applied to the enforcement of a criminal statute where such statute is fairly susceptible of a different construction. The accused in such case has the right to rebut the presumption of *prima facie* agency which the evidence makes against him by showing, if he can, that the criminal act was, in fact, committed without his authority and against his instructions.

"Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offenses are either principals or accessories. In offenses less than felony all are principals. But when it in fact appears that the person accused in no way participated in the commission of the criminal act, he ought not, by construction, to be made punishable for it.

"Of course, the directions to the clerk or agent forbidding the sale must be in good faith to be of any avail. For, however notorious or formal such directions may be, they can have no effect if they are merely colorable. The fact of agency is to be determined by the *real understanding* between the principal and agent."

If the employer may be held accountable criminally for infractions of this law by his employes, notwithstanding the *bona fide* instructions and efforts of the former to prevent unlawful

sales, then he is so much at the mercy of his employes that if one of them should purposely disregard his instructions and violate the law with a malicious purpose of getting his employer into trouble, that fact could not be shown for the purpose or with the effect of exonerating the employer. I repeat, such results are not in harmony with the spirit of fairness and the humane principles permeating our criminal law.

Now, as I have said, it seems to me that in the case of *State v. Kelly, supra*, there is no departure by our Supreme Court from well settled principles respecting the question of *scienter* in prosecutions for violations of statutes respecting the adulterating of food, and that there is no indication of any purpose to depart from, or to qualify the rule laid down by the Supreme Court in the case of *Anderson v. The State, supra*. And, for my part, upon a mere apprehension of what the Supreme Court might possibly do, I am not willing to decide contrary to what I understand to be at present the express holding of the Supreme Court of Ohio.

Therefore, I dissent.

BOND OF A RESIDUARY LEGATEE.

[Circuit Court of Cuyahoga County.]

HENRY A. TIDD, ADMINISTRATOR, v. MELISS BLOCH ET AL.

Decided, March 15, 1904.

Bond—Executed by a Legatee for Payment of Debts of Estate—Is a Lien as Against Such Legatee Upon Real Estate—Conveyed in Trust for the Protection of the Surety—Rights of the Surety May Be Determined in a Suit to Sell the Realty—But Costs and Expenses of Administration Must be Fixed by the Probate Court—Appeal.

1. The bond of a residuary legatee to pay the debts of the estate is a lien as against the legatee upon realty conveyed in trust for protection of the surety on the bond.
2. An action to sell such realty has all the essentials of a civil action, and may be brought in either the court of common pleas or the probate court, and in either court in which the

1904.]

Cuyahoga County.

suit may be brought, or on appeal, the rights of the several parties in the subject matter may be determined.

3. But the probate court having exclusive jurisdiction to settle the accounts of executors and administrators, it is incompetent, where such a suit is brought in the common pleas, for that court to attempt to fix the costs and expenses of administration.

MARVIN, J.; HALE, J., and WINCH, J., concur.

Appeal by plaintiff.

Aaron Bloch, late a resident of this county, died intestate, in March, 1897. By his will he made certain bequests, and then bequeathed, after payment of his debts, all the residue of his estate to his widow, Meliss Bloch, the plaintiff in error, and named her as executor of his will. She declined to act as executor, and thereupon the probate court of this county appointed Claude D. Fish administrator with the will annexed of the estate of said deceased. On the 27th day of October, 1897, the probate court, on motion of said Meliss Bloch, removed said administrator, making upon its journal the following entry:

“On this 27th day of October, 1897, the motion for the removal of the administrator filed by Meliss Bloch, widow and legatee under the will of Aaron Bloch, came on to be heard upon the exhibits and testimony, and was argued by counsel; whereupon the court, being fully advised in the premises, does find that the bulk of the assets of said estate consist of the capital stock in the Bloch Billiard Table Company; that by the terms of the last will and testament of the decedent, Meliss Bloch, after the payment of small legacies, is the residuary legatee of all said property; that she is capable of acting in her own right; that the debts of said estate are due to sundry persons in the amount of \$670 and upwards; that with the payment or security of the debts, the further administration of the estate, to-wit, the management of said capital stock, can best be subserved by permitting the legatee to manage the same herself; that said administrator has committed no acts of malfeasance or misfeasance in office, but has been a faithful, diligent and efficient administrator, and was not incompetent, nor did he procure said trust by misrepresentation, fraud or otherwise, and said administrator is in no sense impeached by this order. It is therefore hereby ordered and adjudged that the motion to remove the administrator and terminate the trust, be and is hereby granted, and the administrator is hereby ordered to make his final settlement within ten

days, and the further administration of this estate, at the option of said legatee, be conducted by her and in pursuance of the statute authorizing a residuary legatee to give bond to pay debts, which shall be given to the approval of the court within ten days.

"On this 30th day of October, 1897, it appearing to the court by certificate of the Clerk of the Court of Common Pleas that one of the heirs of Aaron Bloch has begun an action in the court of common pleas to contest the will, and it appearing to the court that Meliss Bloch, residuary legatee under said will, should give a sufficient bond to answer for the assets of said estate, if the will of said decedent should be set aside, it is thereupon ordered that she give bond as residuary legatee in the sum of \$18,000, on or before November 10th, 1897, conditioned according to law, with sureties to be approved by the court, and the order of October 27th, 1897, in regard to said bond is modified accordingly. And it further appearing to the court that the former administrator has filed his final account and makes claim for compensation, the same is set for hearing November 4th, 1897, at 10 A. M., together with the application of said Meliss Bloch for her appointment as executrix, she having filed her affidavit as to what said estate consists of and the probable value thereof."

Thereupon the said Meliss Bloch applied to The National Surety Company to become surety upon her bond, ordered by the probate court as hereinbefore set out. And on the 6th day of November, 1897, said surety company did execute a bond as surety for said Meliss Bloch, and the same was filed by her in said probate court, in pursuance of its said order. Said bond reads as follows:

"Know All Men By These Presents, That I, Meliss Bloch, as principal, and The National Surety Company, a corporation, and George Bloch as sureties, are firmly held and bound unto the state of Ohio, in the penal sum of eighteen thousand (\$18,000) dollars, for the payment of which sum, well and truly to be made to the said state of Ohio, we do bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents. In witness whereof, we hereunto subscribe our names this 6th day of November, A. D. 1897.

"The condition of the above obligation is such, that if the above named Meliss Bloch, sole residuary legatee and devisee of Aaron Bloch, and sole executrix of the last will and testament of Aaron Bloch, deceased, late of the city of Cleveland, county of Cuyahoga and state of Ohio, shall pay all the debts and lega-

1904.]

Cuyahoga County.

cies of the said Aaron Bloch, deceased, and the just charges of the administration, and shall pay over said estate to the person entitled thereto in case the will of the said Aaron Bloch be at any time set aside, then this obligation shall be void, otherwise the same shall remain in full force and virtue in law." Here follow the signature of the parties.

Upon the filing of said bond as aforesaid the court entered the following upon its journal:

"Now comes Meliss Bloch, residuary legatee, and presents her bond as such, in the sum of \$18,000, with Geo. R. Bloch and the National Surety Company as sureties, to the approval of the court, and it is ordered that said estate be turned over to her."

And later said court entered the following upon its journal:

"It appearing to the court that Meliss Bloch, the residuary legatee herein, has filed her bond as such, the order hereinbefore made is found to be complied with" and the personal estate of the deceased was thereupon delivered to her by the administrator hereinbefore named. No letters testamentary were ever issued to the said Meliss Bloch.

At the time of the execution of said bond by the surety company the said Meliss Bloch together with her son, George R. Bloch, entered into an obligation in writing to said surety company, whereby they agreed to pay certain premiums to it for the giving of said bond, and whereby they undertook and agreed to indemnify said company from loss on account of said bond, the language of the obligation in that regard being as follows:

"That we will at all times indemnify and keep indemnified the company and hold and save it harmless from and against any and all demands, liabilities and expenses of whatsoever kind or nature, including counsel and attorney's fees, which it shall at any time sustain or may incur by reason, or in consequence of having executed said instrument, and that we will pay over, reimburse and make good to the company, its successors and assigns, all sums and amounts of money which the company or its representatives shall pay or cause to be paid or become liable to pay, under its obligations upon said instrument, or as charges and expenses of whatever kind or nature, including counsel and attorney's fees by reason of the execution thereof, or in connec-

tion with any litigation, investigation or other matters connected therewith, such payment to be made to the company as soon as it shall have become liable therefor, whether it shall have paid out said sum or any part thereof or not."

At the time of the giving of the foregoing instrument, the said Meliss Bloch and her said son, George R. Bloch, executed and delivered to F. H. Goff a warranty deed of certain real estate which was owned by the said Aaron Bloch at the time of his death. This deed was expressed to be in trust:

"To secure the National Surety Co. of New York for any loss, damages, cost or expense it may in any manner sustain by reason of having signed as surety a certain bond in the sum of \$18,000 for the said Meliss Bloch as executrix and residuary legatee under a will of Aaron Bloch, deceased, late of Cuyahoga county, Ohio, which will has been probated and is being administered in the probate court of said county. When the liability of said surety company upon said bond shall have terminated and all premiums due to said company for executing the same shall have been paid, said trustee shall reconvey said lands to said Meliss Bloch, her heirs and assigns."

As has already been said, under the will of Aaron Bloch Meliss Bloch was given all the property after the payment of certain legacies and the payment of debts so that the real estate conveyed by this deed belonged to Meliss Bloch, subject to the payment of such debts and legacies and the costs and expenses of administering said estate. Presumably the reason for having George R. Bloch join in the deed was, that there was, at the time of its execution, a suit pending to set aside the will of the testator which, if successful, would give to the son an interest in this property as an heir, but as that suit was unsuccessful, it need not be considered in the determination of this case.

Later, without any further order having been made by said probate court in relation to Meliss Bloch, Henry A. Tidd was appointed by said last named court administrator de bonis non with the will annexed of the estate of said deceased. This appointment was void and had the effect to take from Meliss Bloch any right of further administration, if she had any such right. On the 18th day of May, 1899, he filed his petition, as such administrator, in said probate court, setting out that there were

1904.]

Cuyahoga County.

debts of said decedent remaining unpaid, and praying for an order authorizing him to sell the real estate of the deceased, described in said petition, it being the same as that described in the trust deed to Goff. In this action Meliss Bloch, the heirs at law of Aaron Bloch, deceased, The National Surety Company, F. H. Goff, trustee, and various parties having or claiming liens upon said real estate, created in the lifetime of said Aaron Bloch, were made parties defendant.

The several defendants answered, setting up their claims, and all consenting to a sale of the premises and that the avails of the sale should be brought into court and the rights of the parties thereto determined. Thereupon sale was ordered, made, reported and confirmed and the court then heard the case as to the rights of the several parties to the avails of such sale and entered its judgment thereon. From this judgment appeal was taken to the court of common pleas, where the case was tried and judgment had.

The answer of The National Surety Company and F. H. Goff, trustee, sets up a claim for payments made and expenses incurred and premiums due under the agreement made with said company by Meliss Bloch and George R. Bloch, and claimed that under the trust deed said company had a lien on the interest of Meliss Bloch in said real estate. The present proceeding is brought by Meliss Bloch to reverse this judgment of the court of common pleas. Complaint is made that the court fixed the amount owing to the surety company under the obligation given to it by Meliss Bloch and George R. Bloch, and finding the same to be a lien on said premises as against Meliss Bloch.

It is argued, first, that as letters testamentary were not issued to Meliss Bloch, there was no authority for the giving of the bond by her on which the surety company was surety. The bond which she undertook to give and which the surety company supposed she was giving is provided for in Section 5997, Revised Statutes, and reads:

“If the executor is residuary legatee, he may, instead of the bond prescribed in the preceding section, give a bond in a sum and with two or more sureties to the satisfaction of the court, with condition to pay all the debts and legacies of the

testator and to pay over said estate to the persons entitled thereto, in case the will at any time be set aside.

"In which case he shall not be required to return an inventory, unless it shall be made to appear to the satisfaction of the probate court that an inventory should be made and returned, whenever it appears that the probable value of said estate is less than \$500.

"The executor shall not be liable for legacies paid to legatees other than himself, after twenty-four months from the probating of the will, and before an action to set the same aside has been commenced; the legatee, however, shall be liable to repay the legacy and interest thereon if the will be set aside."

It will be noticed that the bond given is in exact conformity with this statute, so that, without doubt, it could have been enforced against the surety company had letters testamentary been issued to Meliss Bloch.

As we view this case it is not necessary to determine whether the orders hereinbefore quoted, made by the probate court, constituted her the executor or not. There can be no doubt that the court might have made her such, by proper orders, even though no letters were issued to her. The letters are simply the evidence of her appointment. Just what language it would be necessary to incorporate in an order upon the court's journal to constitute an appointment, we need not say, but it would seem difficult to use language more definitely declaring that one named as executor in the will should act in that capacity than was used when the court ordered that—

"The further administration of this estate, at the option of said legatee, be conducted by her in pursuance of the statute authorizing a residuary legatee to give bond to pay debts, which shall be given to the approval of the court within ten days," and then, after a bond in exact conformity with the statute is given by her, and the court uses this language in its order:

"Now comes Meliss Bloch, residuary legatee, and presents her bond * * * to the approval of the court and it is ordered that said estate be turned over to her."

But whether by this bond the surety company was bound to pay the decedent's debts or not, it had the written undertaking, as hereinbefore shown, of Meliss Bloch, to indemnify it against any and all demands, liabilities and expenses, including counsel

1904.]

Cuyahoga County.

fees which it might sustain or incur by reason of having executed such bond and to pay the premiums for so executing it, and it had in the hands of its trustee, Goff, the deed to secure the performance of this agreement. It claimed to have made payments, to have incurred expenses and to be entitled to premiums on account of having so executed the bond. That being so, it would be entitled to reimbursement, and as against Meliss Bloch, it would have a lien on this real estate, whether the bond could have been enforced against it or not.

Meliss Bloch was the residuary legatee. This real estate, under the will of her husband was hers, provided she paid the debts and legacies and costs and expenses of administration. She agreed, for the purpose of keeping this real estate, that if the surety company would make these payments for her, she would repay them and also pay their expenses and the stated premium. If they did this for her she could not escape liability to them.

It is further complained that the rights of the company as against Meliss Bloch could not lawfully be determined in the proceeding to sell real estate.

Section 6137, Revised Statutes, provides that the executor or administrator, in order to obtain the necessary authority to sell real estate to pay debts, etc., "shall commence a civil action in the probate court or the court of common pleas," etc.

Section 6142, Revised Statutes, provides that—

"In such action the widow of the deceased, and the heirs, devisees or persons having the next estate of inheritance from the deceased, and all mortgages and other lienholders, whether by judgment or otherwise, of any of the lands sought to be sold, and all trustees holding the legal title thereto or to any part thereof * * * shall be made parties."

Section 6145, Revised Statutes, provides that the court in which such action is pending, shall have full power to determine the equities between the parties and to order a distribution of the avails of the sale according to the equities and priority of lien as found by the court.

This action, then, has all the essentials of a civil action, and may be brought either in the court of common pleas or in the

probate court, and in whichever court brought, the rights of the several parties in the subject-matter of the action may be determined by such court. If brought in the probate court it may be appealed to the court of common pleas, as was done in this case, and the appellate court has the same jurisdiction as it would have had if the case had been originally brought in that court. Revised Statutes, Section 6407.

We hold, therefore, that the common pleas court had jurisdiction to determine the rights of the surety company as against Meliss Bloch, and its judgment in that regard is affirmed.

It is further complained that the court fixed by its order what credits should be allowed to the administrator and what unsecured claims should be paid by him.

Section 524, Revised Statutes, provides that the probate court shall have exclusive jurisdiction to settle the accounts of executors and administrators. Section 6407, Revised Statutes, provides for appeals to the court of common pleas "from any order, decision or judgment of the probate court in settling the accounts of an executor, administrator," etc.

This appeal is distinct from the appeal provided for in the same section in proceeding for the sale of real estate. It follows, therefore, that the court of common pleas exceeded its jurisdiction in determining what credits should be allowed or disallowed to the administrator and what unsecured claims should be paid by him.

The judgment of the court of common pleas is to be so modified as to order the administrator, out of the avails of said sale, to pay to said surety company the amount found due to it from said Meliss Bloch, or so much thereof as shall not be required for the payment of debts of the deceased, and the costs and expenses of administration as the same shall be fixed by the probate court upon the settlement of the accounts of said administration in that court.

T. H. Johnson, for plaintiff.

Kline, Carr, Tolles & Goff, for defendant.

1904.]

Logan County.

PURCHASES AND DELIVERIES BY INSTALLMENTS.

[Circuit Court of Logan County.]

**THE CONTRACTORS AND BUILDERS' SUPPLY COMPANY V. THE
ALTA PORTLAND CEMENT COMPANY.**

Decided, February Term, 1904.

Bills of Exceptions—Unattached Box of Exhibits—Review on Weight of the Evidence—Measure of Damages and Misdirection to Jury as to—Groundless Counter-claim—Purchases and Deliveries by Installments—Effect on Contract of Sale of Failure by Purchaser to Pay at Stipulated Time.

1. Where a bill of exceptions and a box of exhibits were filed in the common pleas court on the same day, but were not attached at that time, and there is no fact except the simultaneous filing of the box and the bill to identify the box or its contents with the case on review, the box does not become a part of the bill of exceptions.
2. The subsequent attachment of the box to the bill of exceptions by a string after the case had reached the circuit court, is either an amendment of the bill by an act of the party, or the attachment has no significance whatever; and in either event the tie that binds should be severed, and the disconnected parts given such recognition as each is entitled to on its own showing.
3. An identification of the box and its contents being impossible, except from sources outside of the record, and it affirmatively appearing from an inspection of the record that there were matters of evidence considered by the jury which are not a part of the bill submitted to the trial judge and signed by him, it follows that the bill of exceptions before the reviewing court can not be considered on the weight of the evidence for the reason that it does not contain all of the evidence, the certificate of the trial judge to the contrary notwithstanding.
4. A misdirection to the jury as to the measure of damages applicable to a given case is immaterial, unless the jury was also misdirected as to right to recover, where it appears from the record that the jury assessed no damages.
5. However the law may stand in the case of a well grounded counter-claim made by a defendant for damages, it can not be seriously contended that the assertion of a groundless counter-claim, even if asserted in good faith, excuses a defendant from the performance of an obligation either admitted or proved on trial.
6. Under the contract in suit, the purchaser having failed to make installment payments when due, the seller had the right to refuse to make installment deliveries at the time agreed upon.

MOONEY, J.; DAY, J., and NORRIS, J., concur.

In the original action defendant in error as plaintiff sued to recover from plaintiff in error as defendant, a balance of \$1,145.60 upon an account for merchandise sold and delivered. In its amended and supplemental answer and cross-petition said defendant admitted the account and set up a credit on the same of \$218.90 arising since the commencement of the action, leaving an admitted balance of \$926.70 on the account. To cancel this balance and also to secure a recovery in its own favor defendant by way of cross-petition pleads two causes of action:

First. That under a contract entered into 1901 for an agreed price to be paid by defendant, plaintiff agreed to sell and deliver certain cement, which upon test made by the Osborn Engineering Company, of Cleveland, Ohio, would prove to be and, in fact, would be of a certain quality; that in pretended performance of said contract plaintiff did deliver certain cement which in fact was not subjected to the required test and which was worthless in quality; that defendant relying upon plaintiffs performance of its contract accepted more than 285 barrels of this worthless cement and used the same in the construction of a railroad platform; that said construction was defective by reason of the worthless quality of said cement and defendant was compelled to reconstruct the platform, in all to its damage in the sum of \$1,200, for which judgment was prayed.

Second. Defendant states that on March 6, 1902, plaintiff and defendant entered into another contract by the terms of which, for an agreed price to be paid by defendant, plaintiff agreed to manufacture and sell to defendant, and deliver on board cars at Rushsylvania, Ohio, during the building season of 1902, 15,000 barrels of the best brand of Alta Portland cement, deliveries to be made in such quantities and at such times during said season as defendant might from time to time require, payment to be made within sixty days from date of each bill of lading; or defendant might pay in ten days and retain a discount of two per cent. Defendant states that during said season plaintiff delivered under said contract 950 barrels of cement and no more, the same being the merchandise an account of which is stated in plaintiff's petition, and plaintiff has and

1904.]

Logan County.

does now, without any fault of defendant, fail, neglect and refuse to furnish and deliver any more cement under said contract and by reason of such failure, neglect and refusal the defendant, without any fault upon its part, has been unable to supply the demand upon it, and has suffered and sustained a loss of the difference between the market value of cement during the season of 1902 and the price at which plaintiff agreed to furnish the said 15,000 barrels of cement, to-wit, the sum of \$1.0742 per barrel, making a total of \$15,092.51, for which upon this second cause of action judgment is prayed. Plaintiff by way of answer to the cross-petition pleads a waiver by defendant of the required test as alleged in the first cause of action and denies all other statements of the cross-petition.

The action on these issues was tried to a jury, and a verdict returned for plaintiff in an amount exactly equal to the balance due on plaintiff's account as admitted by defendant, with interest from the date named in the petition to the day of trial. Defendant filed its motion for a new trial, one ground of which is that the verdict is not sustained by sufficient evidence. This motion was overruled and judgment was entered on the verdict. Defendant duly took a bill of exceptions, and now prosecutes error here to reverse the judgment of the common pleas. The errors assigned are, in substance, in the rulings of evidence, in the charge to the jury and in overruling a motion for a new trial.

The bill of exceptions, as it appeared when called to the attention of this court, consisted of a volume of typewritten testimony, statements as to rulings thereon, certain identified letters, documents and depositions, the charge of the court and exceptions thereto. To this volume there was attached a pasteboard box bearing two labels as follows: "Plff's Exhibits 16 and 17" and "Deft's Exhibits A1, A2, A3 and A4." The box itself bears no other marks of identification. Enclosed in the box are six separate specimens of cement composition. These specimens are labeled respectively "Plff.'s Ex. 16," "Plff.'s Ex. 17," "Deft.'s Ex. A1," etc., but none of them bear any other marks of identification. The bill of exceptions proper shows that specimens marked as those were offered in evidence, at the trial, but

the bill does not refer to the specimens as being attached to it, nor does the box nor the specimens refer in any way by any mark to the bill nor to the action either by number or title. The defendant in error moves to strike the box and its contents from the bill for reasons: 1, said box and contents were not filed in the court of common pleas within time; 2, the same were never submitted to the trial judge as part of the bill; 3, the same were never attached to said bill until after February 15, 1904; 4, the said box and contents were never filed in this court.

The motion was submitted here upon the evidence from which it appears that the second, third and fourth grounds of the motion are well taken. Although there may be some doubt, we find that the bill proper and the box are each filed on the same day in the common pleas, but at the time they were not attached to each other, and there is no fact, except that of simultaneous filing with the bill proper, to identify the box or its contents with the case on review, or in fact, with any case whatever.

It is manifest that the attachment of the box to the bill proper, when the case had been carried to this court, is either an amendment of the bill itself by an act of the party in this court, or else such attachment has no significance whatever. If it be an amendment it is important in this case. In either event we think "the tie that binds" the box to the bill proper should be loosed and the disconnected parts receive such recognition here as each upon its own showing is entitled to. Disconnected from the bill proper there is nothing of record or discoverable upon mere inspection to identify the box or its contents with the case on review, and for information on the point we are driven to sources *dehors* the record as defendant in error was upon his motion. On the authority of *The R. R. Co. v. Mackey*, 53 O. S., 370, we hold the box and its contents to be no part of the bill of exceptions in this case. It results therefore that there is before this court no bill of exceptions containing *all* the evidence submitted at the trial. The certificate of the trial judge to the contrary is of no avail since, upon an inspection of the bill, it affirmatively appears that there were

1904.]

Logan County.

matters of evidence considered by the jury which are not a part of the bill which was submitted to the trial judge and which he signed. This proposition was also involved in the Mackey case heretofore cited.

An examination of the bill of exceptions does not disclose any error in the admission or rejection of evidence, and no special complaint or objection in this respect is pointed out to us in argument, in the briefs or by notation on the bill itself.

We think it is evident upon a reading of the bill itself, that if it be held that the evidence in the bill is all the evidence in the case, there is such a material conflict in the evidence relating to both causes of action stated in the cross-petition that no reviewing court could hold that a finding against the cross-petition is against the manifest weight of the evidence upon either issue. Under these circumstances it is fortunate that the real matters in dispute between the parties are fairly and fully presented by at least one of the exceptions to the charge. We are pleased to be able to conclude that the failure of the bill to present all the evidence does not result in any different ruling here than would be required if we were to hold that the evidence is all in the bill.

Plaintiff in error specially excepted to the instructions given in the charge as to the measure of damages applicable to the second cause of action of the cross-petition. Without quoting the charge, it is sufficient to say that the jury was instructed that if plaintiff in error sustained the claim made in the second cause of action, it would be entitled to a substantial amount in damages, and rules to determine the amount were stated. The jury returned its verdict for defendant in error for the precise amount defendant in error was entitled to recover in the event that plaintiff in error failed to sustain either of its causes of action. It is thus manifest from an examination of the record that the jury found against the plaintiff in error upon both of its causes of action. A misdirection as to the measure of damages on the second cause of action is immaterial unless, as the record stands, the jury was misdirected as to the *right to recover* on that cause of action. Whether there is such misdirection, is the question raised by another exception to the charge.

Plaintiff in error also excepted to the instruction that the dispute between plaintiff and defendant on the question of damages for defective cement for railroad platform under the former contract would be no excuse to plaintiff in error for refusal to pay for deliveries of cement under the contract in suit according to the terms of the latter contract. The correctness of this charge is held, in effect, in *Bradley v. King*, 44 Ill., 339, but we do not think it is now important in the case whether this instruction be correct or not. The jury found that plaintiff in error had no valid claim for damages on account of the platform transaction and that, in consequence, the assertion of such claim by defendants was groundless. However, the law may be in the case of a well-grounded counter-claim made by defendant for damages, it is believed that no one will seriously contend that the assertion of a groundless counter-claim will excuse a defendant from the performance of his obligation arising from a contract either admitted or proved upon trial.

“An ill-founded claim for damages in such case does not excuse a defendant from performance, when performance of his admitted obligation becomes due, and if the claim for damages is, in fact, ill-founded, the good faith of the defendant in asserting such claim is, in an action at law, immaterial.” *Cresswell Ranch Co. v. Martindale*, 11 C. C., 33.

Hence, if this instruction be erroneous, it is not prejudicial to plaintiff in error.

Plaintiff in error also excepted to the instruction, in substance, that if the jury find the contract to be as claimed by defendant in error, and that plaintiff in error did not pay for each shipment of cement at the expiration of the ten days' credit provided by the contract, as defendant in error claims, then on account of such failure by plaintiff in error to pay, defendant in error was released from the obligation to make further shipments of cement under the contract. The jury did find the contract to be as claimed by defendant in error, and so by the correctness of this instruction, the validity of the judgment of the common pleas is to be determined in this proceeding.

The evidence in the record, together with the finding of the jury, makes it clear that defendant in error agreed to manufac-

1904.]

Logan County.

ture and deliver in installments to plaintiff in error from time to time in 1902 as ordered 15,000 barrels of cement; that plaintiff in error agreed to pay for each shipment within ten days from the date of bill of lading; that under said contract, pursuant to plaintiff in error's order, defendant in error shipped on April 29th, 130 barrels; May 5th, 100 barrels; May 14th, 130 barrels; May 16th, 195 barrels; May 16th, 100 barrels; May 28th, 195 barrels; and May 31st, 250 barrels; that on June 3, 1902, defendant in error complained of non-payment for goods theretofore shipped and, in effect, declined to make further shipments; in reply, plaintiff in error asserted that the credit was sixty days on each shipment, and that by contract it was the sole agent for Hamilton county, for defendant in error's product, and that another Cincinnati firm was being supplied by defendant in error with "Alta" cement, and that defendant in error had, in consequence, broken the contract. No part of the price for the cement shipped as heretofore stated having been paid, the original action was commenced in the common pleas June 19, 1902, to recover the same. No payment for the cement shipped has ever been made. Plaintiff in error offered about June 25, 1902, to pay for future shipments in cash, or in any way that defendant in error might desire, but defendant in error declined to make further shipments and based its refusal upon the failure to pay for the installments then delivered according to contract. The question of law is whether, under these circumstances and for the reason relied upon, defendant in error had the right to refuse further performance. The trial court instructed the jury that defendant in error had such right by reason of the non-payment.

While the contract to purchase is divisible or "distributive" as to performance, it was, nevertheless, a single entire contract in its formation and obligation (*Pope v. Porter*, 102 N. Y., 366; *Denny v. Williams*, 5 Allen, 1-4), and the promise and performance on one side was the sole consideration for the promise and performance on the other. In the nature of the contract, at least partial performance on the part of the defendant in error was a condition precedent to a corresponding partial performance on the part of the plaintiff in error. An installment de-

livery was to precede by ten days a corresponding payment. The initial installment was shipped by defendant in error on April 29, 1902. By the finding of the jury, payment of this fell due on May 9, 1902. Subsequent payments fell due before June 3, 1902, on May 15, 24 and 26. Plaintiff in error made default in each case and no payment whatever was made before June 3, 1902, when defendant in error declined to make further shipments on the contract, nor before June 19, 1902, when the original action was commenced, nor before October 28, 1902, when plaintiff in error asserted its second cause of action by way of counter-claim in the original action.

The question arising upon the exception to the charge in the respect under consideration has not been determined by the Supreme Court of our state. In other jurisdictions the cases are in conflict. Courts of the very highest authority have held that the failure of the purchaser to make installment payments, or the seller to make installment deliveries at the very time agreed upon, does not of itself authorize the other party, after performance has commenced, to refuse further performance. After some hesitation and with the decisions of the inferior courts in conflict, the House of Lords has declared this to be the law of England (*Mersey Steel Co. v. Naylor*, 1884, 9 App. Cas., 434-439); the same rule is recognized and enforced in *New Jersey* (*Blackburn v. Reilly*, 54 Am. Rep., 159; *Gerli v. Poidebard Silk Mfg. Co.*, 51 Am. St., 611); in *Iowa* (*Myer v. Wheeler*, 65 Iowa, 390; *Osgood v. Bauder*, 75 Iowa, 550), and in *Michigan* (*West v. Bechtel*, 84 N. W., 69, reviewing many cases).

This last case, page 76, states the rule and its consequences as follows:

“The rule is that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract, or a design no longer to be bound by its terms. This rule leaves the party complaining of a breach to recover damages for his injury of the normal principle of compensation, without allowing him the abnormal advantage that might inure to him from an option to rescind the bargain.”

1904.]

Logan County.

On the other hand, many courts of equal authority with those heretofore referred to have announced and enforced the rule "that the failure of either party to perform an essential term of the contract gives to the other the right to rescind," or refuse thereafter further to perform the contract. Such is the holding of the *Supreme Court of the United States*, *Norrington v. Wright*, 115 U. S., 188; *Cleveland Rolling Mills v. Rhodes*, 121 U. S., 205; *New York, Pope v. Porter*, 102 N. Y., 366; *Winchester v. Scott*, 114 N. Y., 640; *Kokomo Strawboard Co. v. Inman*, 134 N. Y., 92; *Illinois, Bradley v. King*, 44 Ill., 339; *George H. Hess Co. v. Dawson*, 149 Ill., 139; *Rhode Island, King Phillips Mills v. Slater*, 34 Am. Rep., 603; *Providence Coal Co. v. Coxe*, 35 Atl. R., 210; *Pennsylvania, Rug v. Moore*, 110 Pa. St., 236, citing and distinguishing *Scott v. Kittanning Coal Co.*, 33 Am. Rep., 753, which is often cited as opposed; *Maryland, McGrath v. Gegner*, 39 Am. St., 415; *Curtis v. Gibney*, 59 Md. 131; *Massachusetts, Stephenson v. Cady*, 117 Mass., 6, in which case it was held that when executory contracts are made on different days for the sale of goods, the price of which is to be payable on delivery, and the deliveries under the second contract are by its terms to commence when the full quantity required by the first has been shipped, the purchaser can not, after refusing to pay for goods delivered under the first, unless the seller will give security for the entire fulfillment of the contracts, maintain an action for non-delivery under the second contract. See also, *Stokes v. Barrs*, 18 Fla., 656; *Robson v. Bohn*, 27 Minn., 333; *Branch v. Palmer*, 65 Ga., 210; *Fletcher v. Cole*, 23 Vt., 114-119; *Haines v. Tucker*, 50 N. H., 307; *Durnel v. Howard*, 30 Me., 258. These last cases are cited and relied upon as sustaining the rule last above stated, but the writer has had no opportunity to examine the cases themselves in any official report. *Coffinberry v. The Sun Oil Company*, 68 O. S., 488, distinctly recognizes the principles upon which these cases are decided.

It is suggested in the case of *Norrington v. Wright*, 115 U. S., 188, that the rule announced in *Mersey Steel Co. v. Naylor* "is applicable only to the case of the buyer to pay for and not that of a seller to deliver" installments and the inference to be

drawn from the suggestion is that a different rule applies to a buyer in default than to a seller in the same situation. The suggestion referred to was *obiter* the case of *Norrington v. Wright*, and the cases do not lend support to the inference; see Benjamin on Sales, Section 593a; *Kokomo Strawboard Co. v. Inman*, 134 N. Y., 92; *George H. Hess v. Dawson*, 149 Ill., 138; *Rugg v. Moore*, 113 Pa. St., 236; *Stephenson v. Cady*, 117 Mass., 6, and *McGrath v. Gegner*, 39 Am. St., 415, are all cases in which the buyer made default and it was held that the seller was thereby released from the duty to make further performance, and in none of these cases is it held or suggested that the result of a default of the buyer is other or different from that of a default of a seller.

In view of all the cases, and after a careful and critical review of them, Mechem in his recent and valuable work on Sales, at Section 1148, says:

“Though the cases are not in harmony, this view that the failure of either party to perform an essential term of the contract gives to the other the right to rescind that contract is sustained by the clear weight of American authority.”

In the *New Jersey* case heretofore cited, 51 Am. St., 611, Van Syckle, J., dissented and wrote a dissenting opinion, maintaining that for the seller's default in delivering one installment the buyer could refuse further performance. The learned editor of the American State Reports, at page 615, says:

“We entertain no doubt that the dissenting opinion is well supported by authorities, and sustained by reason.”

The consequences of the prevailing opinion were thus described by the dissenting judge:

“Under the rule of which the judgment below is based, if there is a contract for twelve successive monthly deliveries, the vendor may refuse to make eleven of the deliveries as the due days arrive, and still hold the vendee to the acceptance of the twelfth delivery. Such a doctrine will be startling to the business community. It needs no discussion to show, that in those pursuits where supplies are essential to the employment of labor, no business enterprise can be conducted with safety or success under such a rule. A contract for goods in installments

1904.]

Logan County.

is hereby perverted into an agreement to engage in a series of law suits, if the vendor so elects, for such damages as the purchaser may be able to recover, as a substitute for what he expressively bargains for, and during all this period the purchaser can not safely secure his needed supplies elsewhere, because he can not know until the due days arrive whether the vendor will make further default. The injustice of such an exposition of the law is even more conspicuous when we consider that in many cases the purchaser will be compelled to seek redress in the courts of another state or in those of a foreign country."

If the seller ready to perform is not released at his option from further performance upon failure of the buyer to make his payments as agreed, an equal injustice will be done the former and an unexpected hardship visited upon him without any fault whatever upon his part. This seller was a manufacturer of cement. The seller had stipulated for payments within ten days of each delivery. It was not bound by any contract duty to extend a further time of credit nor assume the risks incident thereto. It had the right to rely upon the prompt payment of the installments to supply the necessary funds to continue its manufacture. Having thus arranged for funds, it was not bound to look elsewhere for its supply. It was not bound to enlarge investment by using its own funds or borrowing funds in order that the buyer might continue to make default or to remain in default. It was not bound to accept a chose in action when cash was promised.

"In mercantile contracts time is generally of essence," and this is particularly true in contracts for the manufacture and sale of goods (*Howes v. Shand*, 2 App. Cas., 455; *Jones v. U. S.*, 96 U. S., 24; *Norrington v. Wright and Cleveland Rolling Mills Co. v. Rhodes*, *ubi supra*; *Camden Iron Works v. Fox*, 34 Fed. Rep., 200; *Scarlett v. Stein*, 40 Md., 512; *Cromwell v. Wilkinson*, 18 Ind., 365.

While time of payment is not generally of essence, we have seen that in contracts such as the one under consideration here it is held that time is of essence as to payment as well as to delivery. We conclude in accordance with what we believe to be the clear right, both of American authority and cosmopolitan reason, that in the case on review the seller had the clear

right to refuse further performance under the circumstances stated in the instruction to the jury.

. How does plaintiff in error stand as to the very authorities relied upon by it? Defendant in error maintained below, and the jury found, that each installment delivered should be paid for in ten days. The admitted fact is that plaintiff in error denied that this was the contract—it was entitled to a sixty-day credit, and this not only upon deliveries already made but upon those to be made in the future. This contention of plaintiff in error involved by necessary implication the declaration of plaintiff in error's intention "to abandon the contract, or a design no longer to be bound by its terms" as the jury upon sufficient evidence found the contract and its terms to be. The offer of plaintiff in error through its attorney to make any terms as to payment for further deliveries is not material in the case because the offer was made after the defendant in error had exercised its option "to rescind." So even upon the case of *Mersey Steel Co. v. Naylor*, and similar cases, the plaintiff in error must fail.

It may be added that at the very time when plaintiff in error filed its cross-petition in the original action, that party was in default for performance of its contract not in some mere matter of detail, nor as to some "subsidiary provision," but as to every single duty which was enjoined upon it under the contract and the performance of which constituted the consideration—the entire consideration for defendant in error was therefore to enforce a contract which, before action brought, it had broken, and the entire consideration of which it had been, caused to fail.

If, as Judge Day finds from the record, the transaction between the parties hereto amounts merely to the creation of a selling agency, it is very clear that upon failure of the agent or factor to transmit the proceeds of sales to the principal at the times when under the contract of agency the payments became due, the principal was at liberty to terminate the agency forthwith and bring suit for the balance then due. The writer is *not* of opinion that the transaction resulted in the creation of a selling agency but that it was and is a contract to sell.

1904.]

Hamilton County.

In any view we find no error in the record to the substantial prejudice of plaintiff in error, and for that reason the judgment of the court of common pleas is affirmed.

**FEES TO TRUST COMPANIES FOR ACTING AS
ADMINISTRATORS.**

[Hamilton County Circuit Court.]

**THE UNION SAVINGS BANK & TRUST COMPANY ET AL V. ELIZ-
ABETH S. SMITH ET AL.**

Decided, May 12, 1904.

*Wills—Review of Controversy as to Construction of—Does not Involve
Weight of Evidence—Necessary Parties Thereto—Statutory Fees
May be Paid to Trust Company Acting as Administrator—Not-
withstanding Invalidity of Act Authorizing Appointment—Defense
of Will by Administrator—Expenses Involved Thereby.*

1. In a controversy which concerns the residue of an estate, legatees who have been paid are not necessary parties.
2. A motion to strike a bill of exceptions from the files upon the ground that it does not contain all the evidence, should be overruled when the errors complained of do not involve the weight of the evidence.
3. A trust company which was appointed without objection as administrator of an estate, and has performed services in that capacity is entitled to compensation therefor, notwithstanding the invalidity of the act under which the appointment was made, and the measure of such compensation is the amount allowed by statute to legally appointed executors and administrators.
4. Where an executor defends a will, and the suit results in a verdict upholding the will, he should be allowed counsel fees, without regard to the fact that the verdict was the result of a compromise between the parties in interest.
5. An executor is not entitled to commissions on real estate which formed part of the residuary estate, and was conveyed in accordance with an agreement between the parties.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

This action arose in the probate court upon exceptions to the account of The Union Savings Bank & Trust Company as ad-

ministrator *de bonis non* with the will annexed of Nicholas Patterson, deceased, and as executor of the last will and testament of Elizabeth P. Patterson, deceased. All the exceptions were overruled by the probate court, and upon appeal to the common pleas court, the exceptions to the allowance of attorney fees to Mackoy & Lowman in a contest of the wills of Nicholas Patterson and Elizabeth P. Patterson, and the exception to the statutory commissions credited in the account of the administrator and executor, respectively, were allowed by the common pleas court and all other exceptions were overruled. To this judgment the trust company prosecutes error and the defendants in error, not having filed any cross-petition in error, the only question for consideration in this court is the judgment of the common pleas court in sustaining such exceptions.

A motion is filed in this court to strike the petition in error from the files for want of necessary parties. The question in controversy concerns the residue of the estate of Elizabeth P. Patterson, deceased, after the payment of certain special legacies. These having been paid, and concerning which there is no dispute, the legatees are not necessary parties and the motion to

A motion is also filed to strike the bill of exceptions from the strike the petition in error from the files will be overruled. files, for the reason that certain exhibits offered in evidence are not attached to the bill, and that it recites that it contains all the *testimony* offered in the case and not all the *evidence* in the case. The motion will be overruled for the reason that the weight of the evidence is not involved in the determination of the case which depends entirely upon the construction of the will of Elizabeth P. Patterson, deceased, and a written agreement dated April 19, 1901, between The Union Savings Bank & Trust Company, executor and trustee under the will of Elizabeth P. Patterson, deceased, The Old Men's Home, The Widow's Home, The Home for Incurables, and The Children's Home, devisees under the will of Elizabeth P. Patterson, of the one part, and Elizabeth S. Smith and Mary E. Bishop, heirs at law of Elizabeth P. Patterson, of the other part, each of which writings are attached to the bill of exceptions.

It is further claimed that the trust company is not entitled to the statutory commissions allowed executors and administrators,

1904.]

Hamilton County.

because under the recent decision of the Supreme Court in the case of *Schumacher v. McCallip*, reported in THE OHIO LAW REPORTER of March 14, 1904, it is held that—

“Trust companies are without capacity to receive and exercise appointments as administrators of the estates of deceased persons, because legislation evincing an intention to clothe them with such capacity is void, being of a general nature and not of uniform operation throughout the state.”

But in that case the objection was made at the time of the appointment, while in this case no objection was then made. The services by the executor have since been fully performed and the estate received the benefit of such services. The defendants in error ought not now be heard in complaint of a reasonable compensation, the measure of which is that allowed by statute to legally appointed executors and administrators.

The residue of the estate of Nicholas Patterson, deceased, was devised and bequeathed to his wife, Elizabeth P. Patterson, and under the tenth item of the will of Elizabeth P. Patterson, it is provided that—

“Subject in all respects to the foregoing provisions of this my will * * * I give, devise and bequeath all the rest and residue of my property real and personal, wherever the same may be, to The Union Savings Bank & Trust Company of Cincinnati, Ohio, to have, hold, manage and control, sell, invest and reinvest, in trust nevertheless, for the uses and purposes and subject to the limitations hereinafter mentioned.”

The defendants in error, Elizabeth S. Smith and Mary E. Bishop, having commenced an action to contest the will of Nicholas Patterson, and also that of Elizabeth P. Patterson, the agreement of April 19, 1901, was made providing that said parties of the second part will forbear all further contest of said wills, and providing that—

“The said devisees and each of them, in consideration thereof, agree and consent that the said executor and trustee of Elizabeth P. Patterson shall pay over and convey to said Elizabeth S. Smith and Mary E. Bishop, the one-half of all property and sums which are devised to said executor and trustee for the use and benefit of each of said devisees, in pursuance of the order of the probate court, in re the estate of said testatrix, this day made.

“And it is further understood that in making the said division the real estate, or any part thereof, may be taken at an agreed value by either of said parties, or if otherwise, shall be sold at public auction, and the said devisees “will unite with said executor and trustee in the conveyance thereof, the proceeds thereof to be divided as above provided.”

It is claimed by Mrs. Smith and Mrs. Bishop that under this agreement the executor is not entitled to an allowance for counsel fees in the contest of the will, nor of its statutory commissions upon the personal estate accounted for. It is contended that they are entitled to one-half of the property devised to the executor for the use and benefit of each of said devisees. Nothing, however, is devised to the executor, but under the tenth item of the will, the rest and residue is devised to The Union Savings Bank & Trust Company as trustee for the four charities. The residue could not be ascertained until the debts and special legacies were paid and the estate fully administered, when the balance, less expenses of administration, would be paid by the executor to the trustee.

As a part of such expense, the executor has credited this account with the payment of two thousand dollars to Mackoy & Lowman, in the contest of the two wills. In the case of *Andrews' Executors v. His Administrators*, 7 O. S., page 143, the syllabus is as follows:

“An executor is not bound to assume the burden of the defense of a contest of the will by the heirs at law, but may properly throw the same upon the legatees or devisees. The executor is not entitled, when the will is adjudged invalid, to charge the estate, in his settlement account, with the expense of maintaining such defense.”

And on page 151, the court say:

“We find no authority to sustain the position that a party acting as trustee is bound to defend *the relation of trustee* whenever the rightful existence of that relation is assailed or called in question; although, should he do so, and do it successfully, it seems he would, in *that case*, be entitled to charge his proper expenses against the trust estate; and this for the reason that his expenditure inures to the benefit of the *cestui que trust*.”

In this case, both of the wills were sustained and while it is true there was an agreement of compromise, yet they were sustained by a jury and the judgment of the court, and now stand as valid wills. We think, therefore, the counsel fees should be allowed, and the court of common pleas erred in sustaining the exceptions thereto.

Section 6188 of the Revised Statutes, provides—

“Executors and administrators may be allowed the full commissions upon the amount of the personal estate collected and accounted for by them and all the proceeds of the real estate sold on an order of court for the payment of debts, or under directions of the wills, which shall be received in full compensation for all their ordinary services.”

The words “personal estate” is broad enough to include the stocks, bonds, and other securities, and when collected together and accounted for by the executor, he is entitled to the statutory commission thereon. The real estate, however, was not sold or conveyed under directions of the will, but in accordance with the agreement of April 19, 1901. It was a part of the residuary estate to be turned over to the trustee and upon which the executor was not entitled to any commission, and in disallowing the same the common pleas court did not err.

The judgment of the court of common pleas will therefore be reversed, in so far as it sustains the exceptions to the allowance of attorney fees, and the exception to the statutory commissions other than that upon the real estate, and affirmed in sustaining the exception to the allowance of the latter commissions.

**DEPOSIT AS A CONDITION OF BIDDING FOR A
FRANCHISE.**

[Circuit Court of Lucas County.]

**WILLIAM R. HATTERSLY v. THE VILLAGE OF WATERVILLE AND
THE NORTHERN NATIONAL BANK OF TOLEDO, O.**

Decided, February 23, 1904.

Municipal Corporations—Control of, over the Construction and Operation of Street Railways—Consideration for a Deposit Made as a Condition for Bidding for Franchise—Breach of Contract to Build the Road—Check Deposited Held to be Collectable.

1. Municipalities of this state have general powers to permit and regulate the construction and operation of street railroads upon such reasonable terms and conditions as they may determine, irrespective of the provisions of Sections 2501, 2502, 3437, 3438 and 3439, Revised Statutes; and regardless of their constitutionality, and as an incident to the exercise of such power, municipalities may regulate the making of bids by third persons for the privilege of building a street railroad and transporting passengers through the streets.
2. A valid contract exists between a municipality and an interurban railway company, when the latter, with knowledge of all the terms and conditions upon which a municipality advertised for bids to construct and operate a street railroad through its streets, whereby it agreed to grant a franchise to the lowest bidder, filed a bid and agreed to accept the franchise if awarded to it, which bid being the lowest, was duly accepted and the franchise awarded by ordinance and which franchise the company accepted.
3. A street railway company can not accept a franchise as soon as it is granted by council and afterwards relieve itself from all obligation thereunder, on the ground that the franchise at the time of such acceptance had not been published and gone into effect. The franchise upon going into effect after its legal publication will relate back to the time it was accepted.
4. The deposit of a certified check by a railway company with a municipal corporation as a guaranty of its good faith and as a condition required by the municipality to secure a bid made by it for the construction of a street railway through the streets, is not without consideration, in that the municipality gave nothing to the railway company and the company agreed to carry passengers within the municipality free of charge, when it appears that the company desiring a franchise through the municipality, in order

1904.]

Lucas County.

- to complete its road from terminus to terminus, applied for a franchise and in consequence thereof the municipality advertised for bids to construct a street railroad through it, agreeing to grant a franchise to the lowest bidder, that the company submitted its bid, which being the lowest was accepted and the franchise granted, whereby it was given eleven months within which to build its road, which franchise was accepted by the company.
5. Under the general rule that forfeitures are not favored, a deposit made or bond given to secure the faithful performance of an obligation will be regarded as a penalty, and held to be a security for such performance or to secure damages arising from a breach which the party may suffer and prove, rather than liquidated damages or a forfeit to be lost absolutely in case of a violation of the contract; but where the circumstances are such and the contract secured is of such a character that proof of damages in case of a breach would be practically impossible, it will be held to be liquidated damages and the contract strictly enforced.
6. A certified check deposited as required by resolution of the council and the advertisement for bids, by a street railway company with a municipal corporation as a guaranty of its good faith and as security for a bid for a franchise in the streets for the purpose of constructing and operating a railroad, which check was to be kept on deposit as a security that the company will carry out all the conditions of the franchise and complete the road within eleven months, and it is provided by the franchise ordinance which was accepted by the company, that the check should become the property of the municipality unless the conditions of the franchise were complied with, will be held to be liquidated damages and not in the nature of a penalty, and will be forfeited absolutely to the municipality if the company fails to commence the road within eleven months or carry out any of the terms of the franchise, but entirely abandons the enterprise.

HULL, J.; HAYNES, J., concurs; PARKER, J., dissents.

This action was brought in the court below by the Village of Waterville against The Northern National Bank of Toledo, Ohio, and afterwards William R. Hattersly, the plaintiff in error, was also made a party defendant. The action was brought on a certified check for \$2,500, drawn by C. E. Sutton in favor of said William R. Hattersly and afterwards endorsed by him to the Village of Waterville. The check was deposited by The Toledo, Defiance & Napoleon Railroad Company with the Village of Waterville to secure the carrying out of a bid and guarantee of good faith of such company, which proposed to and

did bid upon a franchise for the construction of a street railroad through the village of Waterville. The bid of the railroad company was accepted by the Village of Waterville, it offering to carry passengers through the said village free and the franchise awarded to it. By the terms of the franchise many things were required, as is usually the case, and among other things that the construction of the street railroad should be commenced as soon as practicable and completed within eleven months. The franchise further provided that if the conditions of the franchise were not complied with—the railroad not commenced as soon as practicable and finished within eleven months, unless delayed by legal proceedings commenced in good faith, and the other conditions—that this check then on deposit with the village should become the property absolutely of the village. In short, that unless the conditions of the franchise were carried out, the certified check then on deposit should be forfeited to the Village of Waterville. This franchise was accepted by the street railway company by C. E. Sutton, its president, he being the same C. E. Sutton who signed the check in question, Sutton being the president of the company and Hattersly the treasurer of the company, and they seem to have been acting for the company in all these matters. The check was loaned to the company to be used in furthering this enterprise, or at least in securing the bid and as a guarantee of good faith, such a check or that amount in money being required by the resolution passed by the council of the village to be deposited with the bid.

Hattersly and A. K. Detwiler had filed their applications with the village prior to the bid for the franchise and permission to construct a street railroad, and pursuant to that bids were advertised for, and, as I have said, The Toledo, Defiance & Napoleon Railroad Company filed a bid and by it agreed to carry passengers free. The franchise was given to them; there was no lower bid than this, and could not have been.

But after securing the franchise, instead of carrying out the provisions of the ordinance by which it was granted, they violated all of them and did nothing toward the construction of the street railroad. At the end of the eleven months provided for,

1904.]

Lucas County.

the enterprise was abandoned and the village was left and apparently is still left without a street railroad. After the eleven months had gone by the check was presented to the bank for payment. Meanwhile, Hattersly had notified the bank not to pay it. He claimed that the money in the bank belonged to him and the bank refused to pay it. Soon after that this action was commenced by the village against the bank to collect the certified check; and Hattersly also came in as defendant and claimed to be the real owner of the money. A jury was waived in the common pleas court and the case tried to the court and judgment given the village for the \$2,500 with interest, and this judgment is sought to be reversed here.

Various defenses and objections are made by the bank and Hattersly against the payment of this check. I will take up the claims in order and discuss them very briefly. It is claimed first, that the street railroad statutes of this state are unconstitutional, that is, the statutes regulating the construction of street railroads in municipalities and permitting the municipalities to advertise for bids and controlling the proceedings incident thereto; and that therefore this contract, if it was a contract between the Village of Waterville and the railroad company, was void, because based upon unconstitutional statutes. It is claimed that they are unconstitutional for the reason that they are special legislation and in violation of Section 26, Article II of the Constitution of the state, which provides against special legislation, and that all laws of a general nature should have uniform application throughout the state. The sections especially involved here are Sections 2501, 2502, 3437, 3438, 3439 of the Revised Statutes. It is said that all of these really constitute one act and should be considered together. That perhaps is true and Sections 2502 and 3438 are in some degree special in this that certain cities are excepted from their provisions. It is urged that these acts are, therefore, under recent decisions of the Supreme Court, unconstitutional and void; and it is possible that they do form a part of the great number of unconstitutional laws that are in the statute books.

But we shall not now determine whether these street railroad statutes are unconstitutional or not. In our judgment it is one

of the powers of a municipal corporation, regardless of these statutes, to permit and regulate the construction and operation of street railroads through its streets. A street railway, as has been said many times, is only another mode of conveyance; it is a convenience for the public like an omnibus line or hack line or automobile line or many other means of conveyance that are used. One of the powers of a municipal corporation, and the power conferred upon it by the general laws is, we think, to regulate matters of that kind in its streets. It is one of the general powers of a municipal corporation, and without these statutes, municipalities would have the power to permit a company to construct, maintain and operate a street railroad upon such reasonable conditions and terms as the municipality might fix; and that they might, by virtue of such power, regulate the making of bids by a company or person for the privilege of transporting passengers through its streets. These statutes restrict in some measure and regulate this power of the municipal corporation.

But here was a contract made fairly between these parties, after bids were advertised for upon certain conditions to build a street railroad in a street of the village which offered to grant a franchise to the lowest bidder. This company bid upon these conditions and, knowing what the conditions were, it agreed to accept the franchise if it was awarded to it, and the city having examined the bids, awarded the franchise to this company by passing an ordinance and the company accepted it, and this makes a contract between the two parties. There is nothing in it against public policy, no reason, so far as we can see why such a contract should be declared void, or why it should need legislation to permit a municipal corporation to make such an arrangement or contract with a company or with an individual; and without discussing the constitutional question, we hold that this objection to this contract can not be sustained. We do not mean to hold or intimate that these statutes are unconstitutional, for we have not determined that question, nor considered it.

It is said that there was no consideration for the deposit of this check; that the village gave nothing to the railroad company and the railroad company agreed to carry passengers for noth-

1904.]

Lucas County.

ing; that therefore this arrangement was void for want of consideration. We think this is untenable. It is said in argument—it does not appear in the record—that this strip of road through the village was only a link or section in a street railroad proposed to be built from Toledo to Napoleon and Defiance. That may be true. But the company was interested in getting a franchise through the village that it might construct its road from terminus to terminus; it applied to the village, or Mr. Hattersly did, for the privilege of constructing the road; the village advertised for bids and pursuant to that this bid was made, and the franchise ordinance was passed; and it might be a very valuable thing for the street railroad company to have permission to build a road through this street and it may be very prejudicial to the village that it was not built. Therefore, we are of the opinion that the claim that the contract was void, because without consideration, can not be sustained.

It is said that the village has lost nothing; that it might have permitted another corporation to build and operate a railroad through its streets. But it had granted the franchise to this company, had given it eleven months within which to build its road, and meanwhile in the exercise of good business judgment the council would hardly grant a franchise to another street railroad company to lay its tracks over the streets and encumber this village street with two street railroad tracks running parallel with each other. And the village has lost something by reason of the conduct of the railroad company—this breach of contract. The village has lost the street railroad which the company agreed to give it. It has lost the privilege and convenience of transportation which the company had agreed to give it, and had agreed to give the citizens of the village free. It may be true the village has no property in the streets, as is argued; but it has the right under these statutes, or without them, in our judgment, to contract for means of transportation through its streets. The streets of the village are under the general control of the council; certain duties are imposed upon them in regard to their care. While they have no property interests in them, they have the right to use them, to grant permission to use them in the interests of the people, and for their convenience. That is what the streets are for.

It is urged further that this contract is void for the reason that at the time this ordinance was accepted it had not gone into effect, because it had not at that time been published. We think this objection can not be sustained. It was afterwards published as required by law; and when it went into full effect by reason of publication that would relate back to the time that the ordinance was accepted. The street railroad company could not accept a franchise as soon as it was passed by the council and then relieve itself of all obligation under it on the ground that at the time it was accepted the franchise ordinance had not yet been published and gone into effect. After the ordinance went into effect by publication, the acceptance still remained on file; no effort was made by the company to withdraw it, and no claim of that kind was made and it remained on file for the full period of eleven months provided for by the resolution and by the ordinance afterwards passed granting the franchise.

But it is urged further, and this claim is pressed with more force perhaps, and more zealously than any of the others, that the \$2,500 check required to be deposited by the resolution of the council as a guarantee of good faith and to secure this bid and afterwards required to be kept on deposit to secure the carrying out of the franchise and ordinance, should not be considered and held to be stipulated or liquidated damages, but in the nature of a penalty; and that the village should not be permitted in any event to receive more than the damages actually suffered by reason of the breach of the contract on the part of the railroad company. No evidence was offered on the trial of the case of any damage to the village, or to any of its citizens, the court below sustaining the contention of plaintiff that the check for \$2,500 was stipulated damages.

It is urged by plaintiff in error that the general doctrine of the courts is that a deposit of that kind, or a contract of that kind, or a bond of that character, will be held to be a penalty, rather than stipulated damages, will be held to be given as security for the carrying out of the contract, or secured for the payment of damages which a party may suffer and which are to be proved, and not as a forfeit to be lost absolutely in case of a violation of the contract. A number of cases have been cited by counsel on both sides, each case depends largely upon the

1904.]

Lucas County.

facts in that particular case. The general rule is that courts do not favor forfeitures, and that unless it clearly appears that it was the intention of the parties that the sum mentioned should be regarded as liquidated or stipulated damages, courts are inclined to hold the amount of the deposits, or the amount of the bond to be a penalty to secure the amount of the actual damages, rather than as stipulated damages. But where the circumstances are such, where the contract to be secured is of such a character that it would be practically impossible to prove the amount of damages, to prove what damages, if any have been sustained, the courts hold that where parties agree that a certain amount shall be held as a forfeit or stipulated or liquidated damages, that such a contract will be enforced to its letter. There are many kinds of contracts where the amount of damage suffered by a breach thereof will be almost impossible to prove; such contracts as where parties agree not to engage in a business or profession for a certain period of time may be given as examples. And it is urged by counsel for defendant in error that this contract here provides for stipulated damages, and thus it should be so held.

In order that we may see just what the contract was, I will read a few lines from the resolution of the village, calling for bids:

“That for the purpose of securing good faith on the part of those filing bids for the said franchise, each and every bid shall be accompanied with a deposit of \$2,500 in cash or a certified check on some national bank in Lucas county, Ohio, that if the franchise is awarded to and accepted by said bidder that said bidder will carry out the terms and conditions of said grant, and will commence the construction of said road without unnecessary delay and complete the same within eleven months from the date of the passage of the ordinance granting said franchise, not counting the time delayed by compulsory legal proceedings instituted in good faith.”

It will be noticed that it is to be a deposit to secure good faith that if the franchise is awarded to and accepted by the bidder that the bidder will carry out the terms and conditions of the grant and ordinance and commence the road within eleven months, etc. And pursuant to that resolution an advertisement for bids was published, and, as I have said, this bid

was made—the bid by this railroad company made—upon and under the conditions stated in this resolution and the check in question was deposited, being drawn by the president of the railroad company in favor of the treasurer of the company and endorsed by him to the village by this endorsement:

“Pay to the order of the village of Waterville, eleven months after the awarding to and the acceptance by The Toledo, Napoleon & Defiance Railroad Company, of a franchise given by the council of Waterville, Ohio, and granting to said company the right to construct, operate and maintain an electric street railroad, under a bid dated and filed January 28, 1901, with the council of Waterville, and the written acceptance of said franchise by said company, and subject to the terms of a resolution passed and published notice thereof authorized by said council, on January 3, 1901, relating to said bid and the terms thereof.

“(Signed)

WILLIAM R. HATTERSLY.”

The resolution referred to being the one from which I have read; and with this endorsement upon it, this check having been certified by the bank, was deposited with the village to secure this bid, and an ordinance granting the franchise was afterwards passed and which was accepted by the company—the ordinance was passed on the fifth day of February, 1901, and was immediately accepted. It contains this language:

“Provided further, if said, The Toledo, Napoleon & Defiance Railroad Co., its successors or assigns shall accept the terms and conditions of this ordinance as herein provided, then the certified check for twenty-five hundred dollars (\$2,500) now in the hands of the village clerk as a guaranty of good faith shall remain with him or his successors in office until eleven months from the date of the passage of this ordinance, and if said The Toledo Napoleon & Defiance Railroad Co., its successors and assigns, at said time shall have completed said railroad and shall have carried out upon its part the terms and conditions of this ordinance, then said check shall be returned to the Toledo, Napoleon & Defiance Railroad Company; otherwise the same shall become and be the property of the Village of Waterville, Ohio.”

This ordinance was accepted, as I have said, by the railroad company through said C. E. Sutton, its president. There are many other requirements and conditions in the ordinance in regard to the building and operating of the street railroad that it is said this check also secured the carrying out of, and according to the strict terms of the ordinance, that is true.

1904.]

Lucas County.

The question is whether this check shall be held to be liquidated or stipulated damages, or whether the village shall be required to bring an action for actual damages, if it can maintain such an action, and the check only held to secure the amount of damages which the village can prove it has actually suffered.

In our judgment this check should be held to be stipulated damages and not as a penalty or as a security for damages proven. We think it was the intention of the parties, at least that it was clearly the understanding of the village, and that it was known by the other parties that the village so understood it. It is a case peculiarly for the rule of stipulated damages; there are authorities that hold that a municipal corporation can not maintain an action for damages upon such a contract as this, unless they are stipulated. The damages in this case are remote and in a measure speculative and it would be difficult, if not impossible, to prove what the damage was to the village or its inhabitants for the failure of the railroad company to build the road through its streets; nor could any citizen be able to show what the damage had been to him or his property; and this being true, it is a case where the parties should be permitted to agree upon a stipulated amount in advance as the damages in case the contract is not carried out.

I shall not undertake to cite very many authorities upon this question. A large number were cited by counsel upon both sides. It does not seem to us that it is a harsh rule to require the railroad company to comply with this contract. Application was made to the village to construct this street railroad. A proper resolution was passed by the village council and an advertisement published asking for bids upon certain conditions, and one of the conditions was a deposit of cash or certified check in this amount to secure the bid and the carrying out of a franchise ordinance, and any person or corporation who bid knew exactly what the conditions were. No one was required to bid or compelled to build a street railroad through this village. If any one desired to avail himself of the opportunity to construct a railroad there, the way was open for him to bid upon the conditions named in this resolution, and availing itself of that opportunity this bid was made and the deposit of this check was made by the company according to this resolution, as a

guarantee of good faith and to secure the carrying out of the bid and the conditions and requirements of the franchise ordinance thereafter to be passed.

It is said there are many other conditions in this ordinance, some of them trivial in character, which, upon the face of the ordinance are also secured by the deposit of this check, such as the method of laying the track, filling in between the rails, building cross-walks, painting poles, putting up wires and many other requirements, and that it would be unconscionable and inequitable to require a forfeiture of this amount for a breach of any one of them. And it is not likely that a court of equity would declare a forfeiture of \$2,500 for a breach of one of these minor requirements of this ordinance, but equity would relieve against it. It would be inequitable and unconscionable to require a forfeiture of such an amount of money in all these instances; and if in each case the amount of damage could be readily ascertained it might be a serious objection to holding this to be liquidated or stipulated damages. The Supreme Court said in the case of *Berry v. Wisdom*, 3 O. St., p. 241, at page 244:

“When the agreement is for the performance of several things, and a gross sum is made payable upon a breach of the contract, and some of the things to be performed are of less importance than others, and the damage sustained could be easily ascertained, the presumption would be that the gross sum was not intended to be liquidated damages.”

But we think this is not that kind of a case; the breach of this contract is not a case where the damages could be easily ascertained; but is a case where it would be practically impossible to ascertain the damages, and perhaps a case where no damages at all could be recovered, and yet, where we can see that the village, as such, has suffered substantial damages by reason of the railroad company failing to build this railroad as it agreed to do, and to carry passengers as it agreed to through its streets free of charge. This bid being on file and the period of eleven months being given, all other persons or corporations were blocked, practically so at least, from building or offering to build a street railroad through this village. It does not seem to us that it would be a salutary rule of law, a healthy doctrine to hold that a company can bid to construct a street railroad

1904.]

Lucas County.

through a municipality as was done here, and offer to carry passengers free and then disregard and violate its contract, do nothing for a period of nearly a year, thus keeping out other companies or individuals absolutely and then wholly abandon the enterprise and be practically immune from all damages. We can readily see how there might be a purpose with companies or persons to put in sham bids to keep others from constructing street railroads and we do not think the law ought to be such as to sustain conduct of that kind—not saying that that is true in this case—but that it might be done. In many cases of this character the courts have construed contracts similar to this to be for stipulated damages.

In the case of *Brooks v. Wichita*, 114 Fed. Rep., p. 297, the court say on page 298:

“For this reason it is common for municipal corporations, in making contracts of this character, to stipulate for the payment of a fixed sum as liquidated damages in case the public utility is not constructed and put in operation within the time limited by the contract (citing cases). This is the only method by which the city can obtain anything like an adequate compensation for the loss and damage sustained by the public by the breach of such a contract. The sum forfeited as liquidated damages goes into the treasury and inures to the benefit of the public.”

In the case of *Peekskill, C., C. & M. R. R. Co. v. Village of Peekskill*, 47 N. Y. Sup., p. 305 (affirmed without report in 165 N. Y., 628), the village granted a franchise to the railroad company to construct a street railroad through its streets. Among other conditions, it was provided that in the event of failure of the company to construct and operate its road within one year, the sum of ten thousand dollars, which it was required to deposit with the treasurer of the village as a guaranty of good faith, should immediately “be and become absolutely the property of the village of Peekskill, for its uses and purposes as liquidated damages for said failure and not by way of penalty. The company never built its road and thereafter sought to recover its said deposit from the village. The court said:

“It may be that at the time when this corporation asked for and obtained the grant others stood ready to furnish what the village was desirous of obtaining. The village has no railroad

and is therefore damaged. How much it is damaged may not be, and probably is not susceptible of proof. It may be damaged in a very large sum, and yet, under any legal rule it would be quite difficult, if not impossible, to prove its damage. By the terms of the contract the village evidently had in mind three things which it wished certainly to provide for: First, to compel a deposit by the plaintiff as a guaranty of good faith; second, to provide a fund to protect itself from any damage it might sustain by the construction of the road, in the interference with and tearing up of its streets; third, for such damages as it might sustain by failure to construct the road. As the difficulty of legally establishing its damages under the last two heads would be attended with great embarrassment, and under the last nearly impossible, we think it was the intent of the defendant fairly to be gathered from the contract and the surrounding circumstances, to contract for this sum as liquidated damages, and not as a penalty."

In the case of the *City of Salem v. Anson et al* (Supreme Court of Oregon), 67 Pac., p. 190, the court said:

"2. Where in granting an electric light franchise a city requires the grantee to furnish bond in a specified sum that the plant shall be completed and in operation by a specified date, and the grantee accepts the terms and furnishes the bond, such sum should be construed as liquidated damages, and may be recovered without alleging or showing any actual damage."

The case of *Nilson v. Jonesboro*, 57 Ark., p. 163, is also in point. The syllabus is as follows:

"1. By a clause in a contract for the building of a street railway in plaintiff town, defendants, in default of its construction within a certain time agreed 'to forfeit and pay' the sum of \$500 to plaintiff. *Held*: An agreement to pay liquidated damages.

"2. By the clause in a contract for the building of a street railway in plaintiff town, defendants, in default of the construction of the railway within a certain time, agreed to 'forfeit and pay' the sum of \$500 to plaintiff. By another clause defendants, as an earnest of good faith, on their part to build the railway, agreed to deposit a bond for \$500 with plaintiff—*Held*: That the giving of the bond, though penal in its nature, would not affect a construction of the former clause as an agreement to pay liquidated damages."

We think these cases state the law correctly and lay down the general law of the land upon this question, and the rule laid

1904.]

Hamilton County.

down is a salutary one. It is plain, simple and easily understood by all men, and such a rule, if in force, affords a municipality some protection against sham bids and enables it to recover substantial damages for the violation and breach of such a contract as this. To send the Village of Waterville to an action for actual damages to be proven upon a trial would be to practically deny all relief in this case. We do not think any rule, either of law or equity, requires this.

We are of the opinion that the judgment of the court of common pleas was correct and therefore it will be affirmed.

King & Tracy, for plaintiff in error.

Smith & Beckwith, for defendant in error.

MANDAMUS TO COMPEL SIGNING OF BILL OF EXCEPTIONS.

[Circuit Court of Hamilton County.]

STATE, EX REL WOLF, v. FREDERICK S. SPIEGEL, JUDGE.

Decided, December 16, 1903.

Bill of Exceptions—Mandamus to Compel Signing of—Affidavits in Support of Motion for a new Trial Not Part of, When; Judicial Discretion—Amendment to Bill.

1. Where the relator prays that the respondent be compelled by mandamus to sign a certain bill of exceptions, and the respondent answers that the said bill is not a true bill and that a certain amended bill was filed which he has determined to be the true bill and has signed and allowed, and this answer is not denied by any reply, the respondent is entitled upon the pleadings to have the bill dismissed.
2. Affidavits filed with the clerk upon motion for a new trial and not presented to the court upon hearing should not be embodied in the bill of exceptions.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

The relator in her petition avers that she filed a true bill of exceptions with the clerk of the court in the case of Carrie Wolf against Sarah Marmet and others, and that the clerk transmitted the bill to the respondent, the trial judge in the case, who returned the same to the clerk unsigned, unindorsed and unallowed, and the relator prays that the respondent be com-

pelled by mandamus to allow and sign the relator's said full, complete and true bill of exceptions in said case against Sarah Marmet and others.

The respondent, by answer, says that the bill of exceptions so filed with the clerk was not a true bill, and that an amended bill of exceptions was filed with the clerk by the defendants in the cause, and the respondent judicially determining that the latter was a true bill, signed and allowed the same. This is not denied by any reply, and upon the pleadings therefor the respondent would be entitled to have the petition of the relator dismissed. But assuming that the allegation in the answer was denied, the question arises whether affidavits filed with the clerk of the court upon a motion for a new trial and not presented to the court upon the hearing should be embodied in the bill of exceptions. The object of filing the affidavits with the clerk before the hearing is to give the adverse party an opportunity to prepare and file before the hearing counter-affidavits, neither of which are a part of the record of the cause. The party so filing the affidavits may elect before the hearing not to present the affidavits to the court, and if offered as evidence the adverse party may object on the ground that they are not properly executed, or that the statements therein are mere conclusions of law, or that the facts stated are irrelevant to the issue. If the objection is sustained by the court and the affidavits ruled out, the party is not entitled to have them attached even then, to a bill of exceptions, unless he excepts to the ruling of the court in excluding them. The affidavits not being presented to the court, the court having no knowledge that the same were filed with the clerk, and rightly declaring the bill of exceptions containing such affidavits not to be a true bill and the respondent having answered that he signed a true bill of exceptions in the cause, this court can not interfere with his discretion in the premises. *State v. Hawes*, 43 Ohio St., 16.

. The petition of the relator will be dismissed.

Galvin & Bauer and Dempsey & Fridman, for relator.

Charles W. Baker, contra.

1904.]

Summit County.

NEGLIGENCE IN CROSSING STREET RAILWAY TRACKS.

[Circuit Court of Summit County.]

DAVID P. HARPHAM V. THE NORTHERN TRACTION COMPANY.

Decided, April Term, 1904.

Negligence—Street Railways—Pedestrian Attempts to Cross Track without Looking for Car—Unobstructed View of Track for Several Hundred Feet—Gong not Sounded nor Fender Dropped—But Pedestrian Guilty of Contributory Negligence.

Where a pedestrian attempts to cross a street car track without looking to see whether there is a car approaching, and is struck by a car and injured, and there is nothing to show that the company was guilty of willful or culpable disregard of duty after having observed his perilous situation, he is guilty of contributory negligence, and no liability attaches to the company, notwithstanding the gong was not sounded or the fender dropped.

MCCARTY, J. (sitting in place of Winch, J.); HALE, J., and MARVIN, J., concur.

Error to the Court of Common Pleas of Summit County.

This cause comes into this court on a petition in error to reverse the judgment of the court of common pleas for alleged errors occurring in the trial of this case in that court. The action was brought to recover damages for the alleged negligence of the defendant below, and defendant in error here. It was tried at the April Term of the court in 1903, to a jury. On motion of the defendant at the conclusion of the testimony the jury were instructed to return a verdict for defendant, which it did, to which exceptions were taken. The cause of action stated in the petition below was as follows so far as I need read it herein:

At the date next hereinafter named the defendant owned and operated a line of street railway in the city of Akron in said county, and in and over the various streets and public ways thereof, and which said railway was then and there equipped with tracks, single as to some streets and double as to others, upon and over which tracks the defendant used cars for the carriage of its passengers, propelled by electricity as the motive power thereof. One of the streets so occupied and used by the defendant with its said tracks and cars moving on and over the

same, at said date, was East Market street, so-called, upon which at the point next hereinafter named the said defendant used and operated a double tracked railroad for its said purpose. At a point on said East Market street two other public streets of said city, to-wit, Arlington street and Kent street, come into the same from the north and intersect it at a common center, and at which point there is a sharp descent on said East Market street from west to east.

Among the cars so owned and operated by the defendant, and propelled as aforesaid, at the date hereinafter named, was car No. 79, and which car was at the time provided and equipped with a gong or alarm, by the proper use of which the motorman in charge of the running of said car could warn travelers upon the highways and streets over which the same was run, against danger to be apprehended from coming in contact with said car, and which gong or alarm on said last named car was at the date next hereinafter named under the sole control of the said motorman engaged in running said car. Said last named car was, at the date next herein named, also equipped and provided with an appliance called a fender, which was at the time in like manner under the exclusive control of the motorman then engaged in running said car. Said fender was attached to the forward end of said car, extending across its entire front, and when not needed for the protection of travelers in dangerous proximity to said car the same was raised and suspended at some distance above the level of the said street car tracks. But the said motorman could at will, and immediately in case of necessity, lower the same to or near the level of said tracks, and thus and thereby could catch or pick up any person who might be on said tracks in front of said car while in motion and hence in danger of being run over by the same, and carry such person safely and keep him from being run over by the wheels of said car, until the same could be stopped and such person rescued from peril.

It was the duty of said motorman in charge of said car to sound said alarm or gong at all times when travelers upon the streets of said city traversed by said car were, or were likely to be, upon or so near said tracks as to be in danger of coming in contact with said car while in motion, and to be vigilant and

1904.]

Summit County.

watchful to discover and warn such travelers in time to avoid such danger of collision with said car, and to lower the said fender in all cases when the said car was in dangerous proximity to travelers upon said streets so traversed by said tracks, the use of electricity as a motive power in propelling such cars being the use of a highly dangerous agency upon streets and public thoroughfares traveled also by pedestrians, animals and vehicles.

On the 25th day of September, A. D. 1901, the plaintiff was lawfully upon said East Market street, and was then crossing the same from the southerly to the northerly side thereof, at or about the said point of intersection of Arlington and Kent streets with the same. At the same time said car No. 79, propelled as aforesaid, was coming down said hill on East Market street from west to east, in charge of the motorman and other agents and servants of said defendant, and equipped with the gong and fender aforesaid.

At the time the plaintiff was crossing said street, as aforesaid, there were congregated and moving around a watering trough located on the northerly side of said East Market street, at or near said point of intersection, and in and upon said East Market street, immediately in front of and near to the plaintiff at the time, a number of teams, wagons and carts, whereby he was obstructed from hearing the approach of said car No. 79, as it came down said hill, until too late to prevent or avoid its striking him, although he was not careless or heedless in that respect, and his not hearing the approach of said car was not owing to any negligence of his.

The said motorman in charge of the running of said car had a clear and unobstructed view of the track in front of him at the time, down said hill, for a long way before reaching the point where said car struck this plaintiff, and to and beyond such point. The plaintiff, without negligence on his part, and in the exercise of due and reasonable care for his own safety in crossing said East Market street, came upon said track of said defendant in front of said car at the time approaching him, but which he did not see or hear, for the reasons above set forth, in time to prevent his being struck by the same, and said car in coming down said hill then and thereupon struck this plaintiff and

knocked him down upon said tracks, and ran over him with its wheels, whereby his right leg was bruised, crushed, mangled and cut off below the knee, and by reason thereof he was thereafter compelled to have the same amputated above the knee.

The said motorman in charge of the running of said car as aforesaid, in the exercise of ordinary care, could have seen, and, the plaintiff says, did see him—that is to say, this plaintiff, upon the said tracks, in time to warn him by sounding said gong, so that he could have gotten off from said track, and so have avoided said collision. But wholly neglecting his duty in that respect the said motorman did not, nor did any other officer or servant of the defendant, sound said gong, or by outcry or otherwise warn or apprise the plaintiff of his dangerous position and proximity to said car at any time, nor did said motorman or any one check the speed of said car prior to its striking the plaintiff, but unlawfully and negligently ran into and injured him, as above set forth.

While said car was approaching the plaintiff as aforesaid, and even after its collision with him had become inevitable, the said motorman, seeing the plaintiff was upon said track in front of him, had time to lower said fender, and could have lowered it, and thereby could have caught the plaintiff and prevented him from going under the wheels of said car, whereby the latter could have saved his leg and escaped bodily injury. But the said motorman, knowing the premises, did not then lower said fender, or make any effort to do so, nor did any servant of the defendant, but he and they unlawfully and negligently omitted to lower the same.

To that petition the defendant filed an answer in which it says it admits it is a corporation organized and doing business as in the petition set out; admits that at or about the time and place named in the petition plaintiff met with some injury, but as to the exact particulars as to the cause, manner and extent of the injury this defendant is not fully advised and therefore can not admit, but denies each and every allegation in that behalf in the petition contained. And further answering, defendant denies each and every allegation in the petition contained not hereinbefore expressly admitted, and says that the plaintiff by his own negligence and want of care directly caused or directly contributed to such injuries as he sustained.

1904.]

Summit County.

The case was tried upon the issues made in these pleadings on the evidence. The question whether the court was right in instructing the jury to return a verdict for the defendant involves an examination of the facts as disclosed by the record, so that the question is (1) Has the plaintiff shown that the defendant was guilty of the negligence charged in the petition, or some part of it, and, (2), was the plaintiff himself free from negligence contributing to the injury?

The situation was this: The defendant company was operating its street car No. 79 on its line in said city of Akron on one of the streets called East Market street, and on said street said defendant used and operated a double tracked railroad for its said purpose, and it is averred in the petition that said car which the defendant was operating on said street was equipped with a gong and also with an appliance called a fender, which said gong and fender were under the control of the motorman then engaged in running said car; that on the 25th day of September, 1901, the defendant was lawfully upon said Market street, and was then crossing the same from a southerly to the northerly side thereof at or about the point of intersection of Arlington and Kent streets with the same; at the same time said car 79 propelled as aforesaid was coming down said hill on said East Market street from west to east and was in charge of the motorman and other agents and servants of the said defendant, and equipped with a gong and fender as aforesaid; at the time plaintiff was crossing said street as aforesaid there was congregated and moving around a watering trough located on the northerly side of East Market street; at or near said point of intersection, and in and upon said East Market street immediately in front of and near to the plaintiff at the time, there were teams and wagons and carts, whereby he was obstructed from hearing the approach of said car as it came down said hill until too late to prevent or avoid its striking him, although he was not careless or heedless in that respect, and his not hearing the approach of said car was not owing to any negligence of his; that he was run down by said car and suffered the injuries of which he complains, namely, the loss of a leg and other painful injuries to his person.

So that the question involves the alleged negligence of the company in the operation of said car, and it also involves the

contributory negligence of the plaintiff in and about the happening of that accident, for it is fundamental and needs no citation of authorities to establish that the plaintiff was bound to use ordinary care for his own protection, and that ordinary care must be commensurate with and be the kind of care that persons situated as he was situated on that occasion are bound to exercise to protect themselves. While the company owed a duty to the public generally to run its cars carefully, so far as possible to avoid injury to others, it does not and did not absolve the plaintiff from the exercise of that degree of care that would protect him from danger. It is fundamental also that street railroads, as well as all other sorts of railroads, are entitled to the use of the streets and that pedestrians and others going upon the streets, using them, crossing them, and going along them, are bound to look so as to avoid possible injury.

The facts in this case show that the plaintiff could have seen the approaching car several hundred feet from where he was attempting to cross the track. He was crossing it diagonally, nothing to obstruct his vision for the distance named, and nothing intervened except a bicycle passed him, which he did not see until immediately after it had passed him, and no other thing or obstruction was in his way, so that his attention must have been directed to some object or objects in some other direction than the course the car was coming. It is perfectly clear from the testimony that had he looked he could have avoided the danger; it was but a step or two to get out of reach of the approaching car, and his failing to look when he should have looked was such contributory negligence on his part as would defeat a recovery even though the company had been, through its agents and employes, guilty of negligence on its part, except in one particular instance; that is, where the defendant seeing the danger and knowing that it was about to do the injury, could have avoided it by the exercise of proper care. In such case as that the failure and refusal of the company would have been willful and wanton, and in such case as that even though the plaintiff was guilty of contributory negligence the want of proper care on the part of the company would make it still liable even though the plaintiff was guilty of contributory neg-

1904.]

Summit County.

ligence, and the action for damages would be for the injury sustained.

But there is nothing in this record that shows that the defendant was guilty of willful or culpable disregard of duty after having observed the perilous situation of the plaintiff, and there is nothing in this record that shows that it would have been possible for the motorman to have so controlled his car as to have avoided the injury after he became aware that it was about to occur. So that we are clearly of opinion that the defendant was not guilty of such negligence as would make it liable in any regard so that the plaintiff could not recover were he himself not guilty of negligence contributing directly in any degree to the injury. But we are clearly of the opinion that had the defendant been guilty of the want of ordinary care in the management of its car that the plaintiff so contributed to the injury that he could not recover.

The law seems to be well settled that a pedestrian in crossing a street car track is obliged to look before crossing the same, and that if he fails to do so and by reason of such failure is injured, he can not recover. This identical question was passed upon by a majority of this circuit court within the past year in the case of *The Cleveland Electric Railway Company v. Wadsworth*, in which case the court said:

“It is contributory negligence precluding a recovery for a passenger alighting at night from a street car to pass around the rear end of the car and attempt to cross a parallel track upon which cars are running in an opposite direction every three minutes, without looking in that direction, or checking his pace, or taking any precautions for his safety, he having knowledge of the surroundings and situation of the tracks and of the operation of the cars thereon.”

It can not be said that the plaintiff was ignorant of the situation there. He had crossed that track many times a day for a number of years at least. He knew it was a double track; he knew that the cars run at that time of day every four or five minutes; he knew that one was liable to come along at any time; so that he was called on to at least look and use the ordinary precautions of getting out of the way, and that he did not do. He says himself, in answer to the question:

"Q. You turned and walked down the street and then you turned and walked across the track? A. No, sir; I did not say I walked across the street.

"Q. Turned and walked across the track, and from the time you left that corner and walked down the street to where you turned into the street, and from the time you turned into the street until this car struck you, you never turned your eyes to the west in the direction of the coming car? A. I did not.

"Q. You never looked for the car? A. I did not after that.

"Q. You never looked for the car, I say? A. I did not."

Upon his own testimony he is not entitled to recover in this lawsuit. We are of opinion that the court below was right in directing the jury to bring in a verdict for the defendant. The judgment of the court below will be affirmed with costs. Exceptions noted.

Grant & Sieber, for plaintiff in error.

Rogers, Rowley, Bradley & Rockwell, for defendant in error.

CUSTOM AS TO COMMISSION MERCHANTS' AGENTS GUARANTEEING PRICE.

[Circuit Court of Cuyahoga County.]

THE MAHLER-WOLF PRODUCE COMPANY V. FERD. MEYERS.

Decided, February 29, 1904.

Agency—Scope of Authority of Traveling Solicitor for Commission Firm—Guarantee by Agent of Net Price for Fruit Shipped—Not Binding on His Principals—In the Absence of a Showing of Custom.

A produce commission firm sent out a traveling agent to solicit a consignment of peaches on a strictly commission basis; being unable to obtain fruit at a certain town without guaranteeing it should net the shipper a certain price, he gave such guarantee and fruit was shipped thereunder, but without notice thereof to the consignee and without inquiry on the part of the shipper as to the agent's authority to make the guarantee; in the absence of any evidence showing a usage or custom of the produce commission business to make such guarantees—*Held*; That the guarantee was not within the scope of the agent's authority, and his principal was not bound by it.

1904.]

Cuyahoga County.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Error to the court of common pleas.

This case involves the application of the law of agency.

It appears that in 1897 plaintiff in error was engaged in the produce commission business in the city of Cleveland, and sent one Sidney Kirton to Mifflin, Pa., to solicit shipment of peaches to be sold by plaintiff in error on commission in Cleveland. Kirton found he could get no peaches shipped from Mifflin without a guarantee that they would bring a certain price; he thereupon procured Ferd. Meyers, defendant in error, to ship two car loads of peaches to the firm in Cleveland, guaranteeing that Meyers should net at least eighty cents a crate for the first car load and sixty cents a crate for the second car load.

The peaches were sold in Cleveland, and, after deducting freight and commissions, the balance was paid Meyers, but this balance was some \$400 less than the amount guaranteed by Kirton, and in 1900 Meyers brought suit in the Common Pleas Court of Cuyahoga County, Ohio, against The Mahler-Wolf Produce Company, and recovered a verdict for the amount he claimed, and judgment was rendered on the verdict. On the trial it was shown that the produce company had never authorized Kirton to make the guarantee claimed, and had no knowledge that he had made such guarantee until the suit was brought.

It was further shown that Kirton was employed as a traveling agent, his express authority being to solicit consignments of fruit on a commission basis only; that his firm had never purchased fruit or given any guarantee and no evidence was introduced as to the custom or usage of the business.

Plaintiff in error claims the judgment should be reversed because the verdict is not sustained by sufficient evidence; that is, the agent was without express authority to guarantee what the peaches would bring; he had no authority to so guarantee, implied from the nature of the business, and therefore Kirton exceeded his authority and the produce company is not bound by his guarantee.

Defendant in error says that Kirton could not have bought peaches at Mifflin without the guarantee and therefore the power

to guarantee must be considered incident to and implied from his employment.

Both parties quote the law of agency as applicable to this case, from 1 Am. & Eng. Enc. of Law, 985 to 997.

"A principal is bound by the acts of the agent, whether general or special, within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that he is bound by the acts of the agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out to the public as possessing.

"The principle is elementary and uniform that a power given an agent in a transaction carries with it the authority to do whatever is usual and necessary to carry into effect the principle power.

"Parties in entering into contracts are presumed to have in view the established usages and customs of the particular trade or business with reference to which they are contracting. Third parties in dealing with an agent have a right, therefore, to presume that he has been clothed with all the powers with which, according to the custom of that particular business, similar agents are clothed.

"The authority of a general agent is not unlimited, but must necessarily be restricted to the transactions and concerns within the scope of the business of the principal, and if he exceeds the authority, the principal is not bound.

"It is the duty of all parties dealing with an agent to inquire into the nature and extent of his authority, and deal with him accordingly."

Let us apply the above principles of law to the facts of this case:

The agent had no *express* authority to make the guarantee; it can not be said to be within his *apparent* authority, for such guarantees are not usual or necessary in the carrying on of a commission business. Had the proof shown that plaintiffs in error, in addition to their business as factors, sometimes made purchases on their own account, by themselves or through agents, or even that such purchases were made or guarantees given by men in the commission business, there would, perhaps, be some ground upon which to hold the plaintiff in error for the unauthorized guarantee of its agent.

1904.]

Cuyahoga County.

But counsel for defendant in error calls attention to the fact that the agent could procure no peaches in Mifflin without the guarantee. From this it is argued that the guarantee was necessary to doing any business in that town, and that the agent's mission there would have been fruitless and his employer's time and money wasted, if the guarantee had not been made—hence the authority to guarantee became necessary to the accomplishment of the duties of the agent.

The proposition is not sound. The agent was hired to procure goods to be sold upon commission; the sole business of plaintiff in error was to sell goods on commission. Adopting the contention of counsel for defendant in error, makes the transaction practically one of sale and purchase; indeed the petition is framed on that theory, suit being for balance due on an account for peaches at eighty cents and sixty cents a crate. In no sense can the guarantee be held necessary to the carrying on of a commission business, however necessary it might be in the sale and purchase of goods.

Further, it was *not* shown that the produce company knew of the conditions on which alone peaches would be shipped from Mifflin. It *was* shown that defendant in error made no inquiries into the nature and extent of the agent's authority, although he knew the business his principal was engaged in. "Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk" (1 Am. & Eng. Enc. of Law, 987). If Ferd. Meyers before shipping the peaches had telegraphed his consignee he would not have been deceived by the guarantee which he claims the agent made him. The plaintiff in error should not be prejudiced by this neglect of Ferd. Meyers.

We hold that the agent had no authority, express or implied, to make the guarantee relied upon by defendant in error, and that it was not binding upon the plaintiff in error, it never having ratified the same.

The conclusion here reached is the same as was reached in the case of *Quinn v. Carr*, 4 Hun., 259, where it appears that a commission house sent its agents into the country to solicit consignments of produce on commission, and the agent guaranteed a shipper that his butter would bring a certain price. The court

held that such guarantee was not within the scope of his authority.

Defendant in error having failed to prove the agent's authority, the verdict should have been for the defendant below, and for error in overruling the motion to direct a verdict for defendant and in overruling the motion for a new trial, on the ground that the verdict was against the weight of the evidence, the judgment is reversed.

Hord & Lowenthal, for plaintiff in error.

Johnson & Dunlap, for defendant in error.

PAYMENT AS AN AFFIRMATIVE DEFENSE.

[Circuit Court of Hamilton County.]

SUSAN J. LORD ET AL V. ISAAC GRAVESON ET AL.

Decided, May 16, 1904.

Action on an Account—General Denial—Payment as an Affirmative Defense—Burden of Proof—Charge of the Court—Pleading.

1. While it is necessary to aver non-payment of a debt in order to show a breach of the contract, proof of non-payment not being required, proof of payment is not permissible unless specially pleaded.
2. Where the plaintiff and defendant have been in the habit of exchanging accommodation notes, and there have been other transactions between them in which the plaintiff paid to the defendant, on account or on notes given in settlement of an account, out of the proceeds of such accommodation notes, such payment constitutes a final credit although the accommodation note is not paid when due.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

This was an action upon an account under Section 5086 of the Revised Statutes in which the plaintiffs in error filed a general denial. Two alleged errors may be considered together:

First. That the court erred in charging the jury that payment is an affirmative defense, and the burden of proof is on the defendants.

Second. That the court erred in refusing to allow the defendants to cross-examine the plaintiff upon the question of payment.

The argument is that the averment of a certain amount due upon an account, and that there are no credits thereon, includes the averment that the account is unpaid, and that, therefore, under a general denial, evidence of payment should be received.

In the case of *Lent et al v. N. Y. & M. T. Company*, 130 N. Y., the syllabus contains this proposition:

“In an action upon an alleged indebtedness an allegation in the complaint of non-payment is essential. This is not affected by the rule that payment must be pleaded as an affirmative defense, and can not be proved under the general issue, but the rule simply modifies the general rule of pleading so that the averment of payment is not put in issue by a general denial.”

In the case of *Melone v. Ruffino*, 62 Pacific, 93, the Supreme Court of California held:

“Where a plaintiff has proved the existence of the debt sued on the *onus* is on defendant to prove that it has been paid.”

Judge Swan, in his work on “Pleading and Precedents,” page 246, says:

“Under the general issue at common law, any facts tending to show that, when the action was brought, the plaintiff had no subsisting cause of action, might be introduced in evidence—such as payment, release, accord and satisfaction, etc.; whereas, under the code, the facts themselves, and all the facts alleged in the petition are controverted by the general denial; and if, notwithstanding the existence of those facts, something transpires afterwards which avoids or discharges the cause of action alleged in the petition, then a general denial is not only false, but such facts can not be given in evidence under it.”

On page 188 he says that an allegation that a specific sum on an account or note is due includes the allegation that the claim is a subsisting, existing debt, and is unpaid. It would seem, therefore, from these authorities that while it is necessary to aver non-payment of the debt in order to show a breach of the contract, yet proof of the same is not required, and that in order to prove payment it must be specially pleaded. At all events, the plaintiffs in error were not prejudiced for the reason that on January 23, 1901, they filed an additional answer in which they set up payment by their co-defendant John Carlisle, and afterwards they had abundant opportunity and did cross-examine the plaintiff upon the subject of payment.

The giving of Charge No. 12, requested by the plaintiff and excepted to by the plaintiffs in error, is another ground of error, and is as follows:

“If the jury believe that some part of the plaintiff’s claim for work and labor was paid in cash by John Carlisle, but that at the time of such payments John Carlisle was indebted to the plaintiff for money or notes which said Carlisle had discounted in a sum as great or greater than the amount of such payments, *and* if the jury believe that said Carlisle received as much cash and notes from Graveson for the purpose of meeting his notes to Graveson given on account of the contract as he gave him cash and paid notes on account of the contract, or if the jury believe that Carlisle received from Graveson as much or more cash and notes between the date of his contract and the date of Carlisle’s agreement as he gave Graveson during said time in cash or notes which were paid, *and* the jury is unable from the preponderance of the testimony to say how many and which of the notes and items of cash on either side are connected with the contract, then the defendants are not entitled to any credit on the account for work and labor sued for in this action.”

It is claimed by counsel that this charge contains three distinct propositions, neither of which is sound. But we think that a fair construction limits it to two. The first five lines assume that payments were made by John Carlisle, but that if he was indebted to plaintiff for money and notes in a sum as great or greater than the amount of such payments, the defendants would not be entitled to any credit on the account. Standing alone, this would be clearly erroneous. Payment itself implies a discharge of the debt, and it is immaterial that the defendant at the same time was owing the plaintiff an equal or greater amount upon other obligations. But the next four lines of the charge were intended to qualify this statement, by showing that Carlisle received as much cash and notes from Graveson for the purpose of meeting his notes to Graveson given on account of the contract as he gave him cash and paid notes on account of the contract. The defect in this qualification consists in not limiting it to the time of any particular payment and embracing all the transactions pertaining to the account. If, when a note given in settlement of the account became due and was renewed for a sum less than the original amount and the difference was paid by Carlisle out of his own funds, it constituted a payment

to that extent, notwithstanding a subsequent renewal note was given for the original amount. For example, when the note for \$1,800 became due—September 19, 1891—it was renewed by giving two notes of \$875 each, the difference of \$50 being paid by John Carlisle. This was a final payment of that sum, although in renewing either of the \$875 notes it may have been increased by that amount or more. There are many such transactions shown in the record, as Carlisle and Graveson were exchanging accommodation notes, not only during the life of this contract but for some time prior thereto. It was, therefore, prejudicial error in giving the first proposition contained in this charge, although no objection can be found to the last one.

A like error occurred in the general charge at page 812 of the bill of exceptions, to-wit:

“Nor is the mere passing of the actual money by John Carlisle to Graveson, and it credited on the account, absolute payment, if John Carlisle by some note or other paper got some money or the same amount and subsequently never paid such note or obligation except by renewal. If, however, when John Carlisle gave Graveson money or a note, and Graveson accepted the money or note as payment or satisfaction, or Graveson then gave his note or obligation as a separate or independent loan, looking solely to the note or obligation for payment, the same would be a payment and extinguishment of the debt.”

If money was given by Carlisle to Graveson and credited on the account, the fact alone that Carlisle owed Graveson upon some other obligation did not destroy the credit as a final payment.

The record discloses that when notes were renewed by Carlisle, there was an exchange of notes—Graveson giving to Carlisle notes for the same amount. It is claimed that when this was done, that Carlisle was entitled to use the note received by him as he might see fit, unless at the time some restriction was imposed. An exchange of notes without any limitation upon the use of the same, vests the title to the respective notes in the holder, one being the consideration for the other, and when discounted the proceeds can be applied as the holder may direct. If Carlisle paid any of such proceeds to Graveson upon the account, or upon the notes given in settlement of the account,

it constituted a final payment on account, although Carlisle failed to pay his note when due.

Counsel for defendants in error direct our attention to entries in Carlisle's books, showing that certain notes were given expressly to take up or renew other notes given in settlement of the account, but there are many other entries which fail to show for what purpose the exchange of notes was made except for mutual accommodation. No error of law is predicated on this view of the case, but that the verdict is against the weight of the evidence.

At page 636 of the bill of exceptions, the plaintiff was asked:

"What was said between you and John Carlisle at any time, when you received a note from him, any of these notes that you have testified to?"

"A. There was not anything said at all. If they were paid the understanding was we would credit him with the amount. No agreement about it."

If, therefore, nothing was said at the time, and no understanding was otherwise had as to the use of the notes, then Carlisle could use the proceeds as he wished, even in payment of notes given to Graveson.

The trial court reduced the verdict of the jury by the sum of \$805.59, which counsel for defendants in error claim embraces four items, making in all \$809.59. Upon the same theory that justifies the allowance of these items, we think the verdict should have been reduced by the items of one hundred dollars, sixty-seven dollars, two of fifty dollars each, one hundred and seventy dollars, and one hundred and thirty-six dollars. To this extent, the verdict was manifestly against the weight of the evidence, and the court erred in giving Special Instruction No. 12.

The judgment will therefore be reversed and the cause remanded for a new trial.

John C. Healy, for plaintiff in error.

Stephens, Lincoln & Stephens, contra.

CONSTRUCTION OF WILL.

[Circuit Court of Trumbull County.]

C. W. OWSLEY v. THOMAS PRICE ET AL.

Decided, October Term, 1903.

Wills—Election of Widow to Take Under the Will of Her Husband.

Testator at the time of the execution of his will and at his death, was the owner of the undivided nineteen twenty-eighths of fifty-one and one-half acres of land, and his wife was the owner of the other undivided nine twenty-eighths thereof, they having obtained title by deed executed to them jointly, the property constituting their homestead. He was also the sole owner of two other small parcels of land. His will provided that his widow should have a life estate in all of his real property, and at her death it was to be sold and the proceeds divided as directed in the will. The widow elected in the probate court to take under the will. *Held*: That the widow did not, by such election, waive her right to the fee in the nine twenty-eighths of the fifty-one and one-half acres; that she had a legal right to devise the same and that such devise would be upheld. *Hibbs v. Insurance Co.*, 40 O. S., 543, distinguished.

COOK, J.; LAUBIE, J., concurs; BURROWS, J., dissents.

Appeal from the Court of Common Pleas of Trumbull County.

This is an action for partition of real estate and comes into this court on appeal.

The question involved is the construction of the will of Thomas Price and the effect of an election by Mary L. Price, his widow, in the probate court, to take under the will.

At the time of making the will, and also at the death of Thomas Price, he and his wife were the joint owners of fifty-one and one-half (51 1-2) acres of land in Trumbull county, he being the owner of nineteen twenty-eighths, and she nine twenty-eighths. These premises were their homestead, and they had jointly occupied it as such for a number of years, it being an ordinary small farm. They obtained title through a joint deed executed to them. Thomas Price at the same time was also the sole owner of two small tracts of land, one containing one acre and the other one-fourth of an acre.

His will provided as follows:

“Item 3d. I give and devise all my real property which I do now possess, or may possess at the time of my death, containing at the present time the homestead of fifty-one and one-half acres, more or less, recorded in Trumbull County Records, Vol. 105, page 36, and Vol. 139, pages 6 and 7; also as recorded in County Records, Vol. 142, page 26, containing one acre of land; also as recorded in County Records, Vol. 147, page 336, containing one-fourth of an acre of land, to my beloved wife, Mary Louise Price, during her natural life, not to be sold nor exchanged by her. Then after her death one year, it is my wish that my executor hereinafter named shall cause all of the said property, my real property as above mentioned, also any other that I may possess at the time of my death, to be sold as he may see fit and the proceeds to be by him, my executor, equally divided between the eight following named persons.”

The widow, Mary L. Price, on being cited to appear in the probate court, to elect whether or not she would take under the will, elected in court to take under the will.

The widow, Mary L. Price, after such election, made a will by which she devised her nine twenty-eighths interest, or undivided part, of said fifty-one and one-half acre tract to Mary Jane Owsley and her husband, C. H. Owsley, as she expressed it in the will, “as a reward for kindness and care that they have extended to me in years past, asking them that at my death they will see that I have suitable burial by the side of my deceased husband, Thomas Price.”

C. H. Owsley succeeded to all the rights of Mary Jane Owsley in said premises under such will, if she had any. The Owsleys were not included in the eight beneficiaries named by Thomas Price in his will.

It is claimed that this case is ruled by *Hibbs v. Insurance Company*, 40 O. S. R., 543. We do not think so. In that case the provision of the will was “I give and devise to my wife in lieu of dower the farm on which we now reside, containing about two hundred acres, during her natural life.” Also, the will gave her a large amount of stock on the farm, bank stock, etc., and the clause concluded with the words, “At the death of my said wife, the real estate aforesaid, I give, devise and

1904.]

Trumbull County.

bequeath to my grandson, William Miller." Eighty acres of the two hundred had come to the wife by descent; was her sole property and had been so incorporated with the farm for many years as to entirely lose its identity as a separate tract. The widow elected to take under the will, and the court held by so doing she relinquished her fee in the eighty acres under the doctrine as stated in the case:

"That if a testator has effected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition; but if, on the contrary, he chooses to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights."

And, again:

"It is a well settled principle of equity that where a will assumes to give to one of its beneficiaries property belonging to another person for whom provision is likewise made in the will, the latter is bound to elect whether he will claim the property so disposed of or take the provision made for him in the will, and that he can not have both."

While there is no question but what this is the general doctrine as stated in the authorities; yet they all agree that the rule is a harsh one, and in *Church v. Church, Executor, et al*, 57 O. S. Rep., 561, it is said:

"But it is also well settled that the language of the will is expressive of the intent to give another's property must be unequivocal."

If the provision in question, taken in connection with the whole will, will reasonably admit a construction not involving a disposition of such property, that construction must prevail. In order to create the necessity for an election, there must appear on the face of the will itself a clear, unmistakable intention on the part of the testator to dispose of property, which is in fact not his own. The language must be so clear as to leave

no doubt as to the testator's design, as in the Hibbs case where the testator gave to the wife in unequivocal words the whole farm, "the farm on which we now reside," and which was at his death to go to the grandson. The necessity for an election can not arise from an uncertain or dubious interpretation of the will.

In *Church v. Church*, *supra*, the testator held a number of insurance policies upon his life. Two of them were payable to his wife upon his death, she being named as beneficiary, while several others were payable to him or his estate. The language of the will was: "I direct that my executor collect and realize on all my life insurance policies which I hold on my life and distribute the proceeds in accordance with the terms of my will and codicil." The will and codicil provided that the wife was to receive during her life one hundred dollars per month, so long as her two daughters remained unmarried, and then seventy dollars per month, and also to have the use of residence free of taxes and assessments during her life, and in addition thereto one thousand dollars in cash upon his decease. The court held that, although all the policies of insurance were in the possession of the testator at the time he made his will and up to his death, yet it could not be said that he intended to bequeath the two policies in which his wife was named beneficiary, and although she elected to take under the will in the probate court, and persisted in her election, yet the proceeds of the two policies should go to her.

Spear, Judge, in the opinion, says:

"The subject-matter is his policies—*my* policies, is the phrase. The words following 'which I hold' would, in common parlance, signify manual possession, but the expression is subordinate to that which precedes, and, taken in connection with it, implies possession of that which was his. Nor is the result different if a technical legal meaning is given the word 'hold.' Indeed, it signifies tenure. But tenure can not exist in favor of one respecting that in which he has no property interest. If the question were as to a devise of land in this form: 'All my land of which I have possession,' would any intelligent mind assume that the will evinced a purpose to convey land of another which might at that time happen to be in

1904.]

Trumbull County.

the possession of the testator? Surely not. The canons of construction will not permit a provision clearly disposing only of property in the possession of the testator of which he is the owner to be held to include property in his possession which belongs to another."

Again, he says:

"The case at bar is dissimilar from *Hibbs v. Insurance Company*, 40 O. S., 543, relied upon in argument, in this important particular. There the description of the property of the wife was clearly defined, and it was clearly included in the devise; here it is only not clearly included, but is, as we think, clearly excluded by the terms of the codicil."

In the case under consideration the property was an undivided interest in land. The husband's possession would also be the wife's possession. The provision of the will is:

"I give and bequeath all my real property which I do now possess or may possess at the time of my death to my beloved wife, Mary Louise Price, during her natural life, not to be sold nor exchanged by her; then after her death one year, it is my wish that my executor hereinafter named shall cause all of the said property, my real property, as above mentioned, also any other that I may possess at the time of my death, to be sold as he may see fit, and the proceeds to be by him, my executor, equally divided between the eight following named persons."

The testator, it seems to us, took special pains only to include his own property. The provision is "my real property which I possess or may possess at my death." Then again his executor is ordered to sell all of the said property, *my real property*, not his wife's real property, but *his own real property*, which he possessed of which he had the tenure.

In construing wills there is one rule applicable to all wills alike, and that is, that the meaning and intention of the testator is to be ascertained from the language of the will itself, so that but little aid is given in one case by the construction adopted in another.

In order, therefore, to make this case on all fours with *Hibbs v. Insurance Company*, it would be necessary to exclude from consideration the words "my real property which I do now

possess or may possess at the time of my death," and to reject the inference connected therewith from the reference to the recorded deed of the farm in question, which shows that his real property consisted only of an undivided interest therein. Indeed, not a shadow of resemblance could be made between that case and this, were it not for the words "Containing at the present time the homestead of fifty-one and one-half acres, more or less." These words, however, are themselves equivocal, and taken in connection with the other words of the sentence, "I give and devise all *my* real property which I do now possess," they are made still more equivocal, and the only consistent interpretation that can be put upon them is that the testator meant and intended to say "contained in the homestead," instead of "containing" the homestead. At all events, it is impossible to say that the testator clearly intended to devise to his wife her property—property he did not possess as his own—in using the words of description contained in this item. In one sense he was in possession of his wife's share of the farm; that is, as tenant in common, but the words "which I do now possess or may possess at the time of my death," does not, and can not, be held to refer to and include property thus held, because the testator himself limits their application to property owned solely by himself: "I give and devise all *my real property* which I do now possess;" and "my executor hereinafter named shall cause *all* of the said property, *my real property above mentioned*," to be sold.

This intent, so unequivocally expressed by these words, to include in the devise only that part of the real property which he himself owned, should be the controlling factor in the interpretation of this will.

In the case of *William Melick and wife v. Abram Darling*, 11 Ohio Rep., 343, the syllabus of the case is:

"To create a case of election there must be a plurality of gifts or rights, with an intention expressed or implied, of the party who has a right to control one or both, that one should be a substitute for the other."

1904.]

Trumbull County.

It is true that at that time the syllabus was not necessarily the law of the case, but Wood, J., on page 350 of the opinion in the opening sentence, uses the same language.

That was a case in which the testator and the devisee were tenants in common. The language of the will was: "I also give to my grandson, Jeremiah Beatty, the southwest quarter of section seven in township five and range ten." In the same will provision was made for Abram Darling. The testator and Abram Darling were tenants in common of the southwest quarter of section seven in township ten devised to Jeremiah Beatty, the patent having been issued to both of them. The court held that it was not the intention of the testator to devise both interests, and that Abram Darling was not required to surrender his moiety in order to retain the property devised and bequeathed to him by the will.

In *Rancliffe v. Parkyns*, 6 Dow, 185, cited in note to *Dillon v. Parker*, 1 Swanston Rep., 394, Lord Eldon said that "It is difficult to apply the doctrine of election where the testator has some present interest in the estate disposed of, though not entirely his own."

In *French v. Davies*, 2 Ver. Jr., 578, it is said:

"Before you can prevent the legal right, the intention must be perfectly clear. The intention must be so clear that a judge can say it is impossible the testator could mean the defendant to have both."

Decree for plaintiff, ordering partition of premises as prayed for.

Burrows, J., dissents.

Owsley & Gullmer, for plaintiff.

Arrel, McVey & Taylor, H. A. Zimmerman and Smiley & Weiss, for defendants.

BURROWS, J.

I am not able to concur in the conclusion reached by the majority of the court.

If it clearly appears from the will that the testator, Thomas Price, intended and assumed, in the devise of the homestead,

to dispose of the interest of his wife therein, then the petition of plaintiff should be dismissed.

It is not suggested that the election of his widow, Mary L. Price, to take under the will was not duly and understandingly made or that the plaintiff stands on any higher or better ground than did Mary L. Price. Hence, the contention is necessarily limited to the question whether, by the terms of this will, Thomas Price made a disposition of the entire homestead, consisting of fifty-one and one-half acres.

It is held by the majority of the court that a doubt may be entertained as to the meaning of the language: "I give and devise all my real property which I do now possess or may possess at the time of my death, containing at the present time the homestead of fifty-one and one-half acres, more or less, recorded," etc., and that this language is consistent with an intention to devise only a two-thirds undivided interest therein, although the testator was and for many years had been, presumably in possession of the whole as the family homestead.

It must be conceded that apt and unequivocal language is employed to designate and describe the entire homestead lot as included in the devise. Had the wife been sole owner of it instead of part owner, no question or doubt would exist as to the intention of the testator to make disposition of the lot and the whole of it.

It is said that the use of the words "my real property," containing the homestead, etc., indicates an intention to dispose only of such interest as testator had in the fifty-one and one-half acres. It will be observed, however, that the same phrase is also applicable to the one-acre lot and the one-half acre lot of which he was sole owner, and which is also devised in the same item to his wife.

When we consider the evident object and purpose of the testator in making this will, all doubts as to the meaning of the alleged ambiguous words and phrases are dispelled. The testator gave his wife a life estate in all real property which he then had or which he might thereafter acquire including the fifty-one and one-half acres constituting the homestead, upon

the express limitation that none of it was to be sold or exchanged by her during her life time and that then after her death one year, all of "said property" was to be sold by his executor and the proceeds equally divided between the persons who were the natural objects of their mutual bounty.

No language could have been used to express more clearly the purpose of the testator to keep all of said real estate, including the homestead, intact, and undisposed of during the life of his wife and upon her death to have it sold and the proceeds of the entire property equally divided between his children named in the will. The intention and attempt of the testator to make a complete and final disposition not only of his own interest in the real estate described, but of the interest of his wife in the homestead is, I think, clearly and unequivocally expressed. In this state the rule of decision applicable to the facts in such case is not open to dispute. The case of *Hibbs v. Insurance Co.*, 40 O. S., 543, is substantially a duplicate of the case at bar in all essential particulars; and the reasoning and citation of authorities in that case conclusively settle all controverted questions in this case. It is said that the case at bar may be distinguished from the Hibbs case in respect to the character of the interest of the wives in the homesteads, and in the amount devised in lieu of such interests respectively. In the case under consideration, the wife held a joint interest with her husband, while in the Hibbs case she held separate title in fee to 80 acres of the tract constituting the homestead, and in both cases the whole tract must pass, if at all, under the general designation "the homestead." In the Hibbs case some importance is attached to the circumstance that the land of the wife was so situated and occupied that a "careful survey" would be necessary to determine and mark the boundary between the lands of the husband and wife; and the inference is apparently drawn from this circumstance that there could be no just inference of intention on the part of the testator to devise under such designation only a part of the whole tract that constituted the homestead. If an obliteration or removal of the lines of de-

markation are important upon the question of intention, then surely the impossibility of making any lines of demarkation, as in the case at bar, must be equally important. As to the other alleged distinguishing particular between the cases under consideration little need be said. That more ample provision was made for the wife in lieu of her interest in the homestead in the Hibbs case can not change the rule of decision; besides it is not apparent from the record that there was any disparity in this respect. In the case at bar the testator gave his wife a life estate in two other lots, the value of the use of which may have far exceeded her interest as widow in the estate of her husband and the value of her interest in the homestead. In respect to these two particulars and these alone, attempt is made to distinguish the case at bar from the Hibbs case; and I am compelled to say that in my opinion the authority of the Hibbs case has been ignored rather than distinguished in the decision of this case.

The conclusion reached by the majority of the court is avowedly placed upon the later case of *Church v. Church*, 57 O. S., 561. In that case the court found that it affirmatively appeared that the testator did not intend to dispose of the certificate made payable to his wife, and that under the circumstances the language of the will was only applicable to other certificates held by the testator. The learned judge in his opinion approves of the decision of the Hibbs case in respect to its conclusions of fact as well as law, and points out the dissimilarity between the cases.

The case of *Melick v. Darling*, 11 Ohio, 343, is also cited by plaintiff in support of his contention. The correctness of the decision in the Melick case may be doubted since it was made by a divided court. Judge Wood, who gave the opinion, said "the case is not so clear that he who runs may read." But, if correctly decided, it is an authority for the defendant rather than the plaintiff. The decision is not placed on a want of clearness in the language by which the southwest quarter of section seven is devised to Jeremiah Beatty, nor on the fact that the testator held this quarter section as tenant in common

1904.]

Trumbull County.

with another, but solely on the ground that the "general design" of the testator as evinced by the whole will, was to make an equal distribution of his property to each class of heirs. The two grandsons, William and Jeremiah Beatty, each were given a quarter section of land; but to William he gave an undivided half, while to Jeremiah he gave a quarter section in which he also held an undivided half interest. To give one double what he gave the other was in conflict with the general scheme of the will; and therefore, a majority of the court was of the opinion that it was not clear that he intended to dispose of the interest of his co-tenant in the quarter section devised to Jeremiah.

In the case at bar the general scheme and design of the will is in accord with the terms of the devise by which the entire homestead is disposed of, and is not consistent with any other interpretation. .

The suggestion of counsel in their brief in the Melick case that the doctrine of election should not be applied where the testator has some interest in the property devised, was not noticed by the court in the decision of that case, and has no support from any decision in this state.

Finally it is said that the doctrine of election in such cases is a harsh one. It would in my judgment be a more harsh and unjust doctrine to hold that a devisee to whom a gift has been made on condition that he surrenders certain of his own property to the disposition of the deviser should be allowed to receive the gift and repudiate the condition.

**NEGLIGENCE IN NOT GIVING EMPLOYEE A SAFE PLACE
TO WORK.**

[Circuit Court of Huron County.]

**NEW YORK, CHICAGO & ST. LOUIS RY. CO. v. ROBERT ROE, AD-
MINISTRATOR.**

Decided, November 13, 1903.

Master and Servant—Place in Which Employee is at Work Rendered Unsafe Without Notice—Engineer and Yard Helper not Fellow Servants—Damages for Wrongful Death Should Be Based on Reasonable Expectancy—Charge of the Court—Jury May Consider Loss of Opportunity to Inherit Property.

1. Under the rule that an employer is bound to use ordinary care to give his employes a reasonably safe place to work and see that no injury is done them while working in a situation where they are unable to protect themselves, a railroad company is bound to use ordinary care to see that no cars are moved down upon a helper without notice, who, while cleaning up the yard, is working in an ash pit where he is so surrounded by cars and other obstructions that he is unable to see the track ahead.
2. A helper in a railroad yard while cleaning an ash pit is not a fellow servant of an engineer having charge of a locomotive with a fireman under him within the meaning of Section 3365-22, Revised Statutes, and where an engineer drew his engine out upon the same track where the helper was working at the head of a sharp incline for the purpose of oiling it and allowed it to stand with brakes unset, and because of the brakes being unset, the engine moved down the track and pushed some cars against the helper, who is killed, the railroad company is responsible for the negligence of the engineer.
3. In an action under Section 6135, Revised Statutes, for the recovery of damages for wrongfully causing the death of another, the measure of damages is the reasonable expectancy of what the family or next of kin might have received from the decedent and not the amount it is reasonably certain they would have received.
4. Where a charge as a whole is full and fair a reviewing court will not reverse the case because of unnecessary statements of the court which do not prejudice the plaintiff in error. Thus, where, in an action for wrongfully causing the death of a helper in a yard, the court charges the jury regarding the skill, knowledge and qualifications of the men, which charge was uncalled for either by the evidence or pleadings, the reviewing court will not reverse if it does not prejudice the party seeking to take advantage of it.

1904.]

Huron County.

5. The loss to the children and the widow on account of being deprived of the possibility of inheriting property from the deceased which he might have accumulated during his life is one of the items that may be considered by the jury in arriving at the amount of a verdict in an action for death by wrongful act under Section 6135, Revised Statutes.

HULL, J.; PARKER, J., and HAYNES, J., concur.

Error to the Common Pleas Court of Huron County.

This action was brought by Robert Roe, administrator of John Roe, deceased, against The New York, Chicago & St. Louis Railroad Company, plaintiff in error, to recover damages for the death of John Roe, which, it is claimed, was caused by the negligence of the railroad company, the defendant below. The trial resulted in a verdict of \$2,200 in favor of the plaintiff, and judgment was entered upon this verdict, and proceedings in error are prosecuted in this court by the railroad company to reverse that judgment.

It is claimed by the plaintiff in error that the verdict is against the weight of evidence, and that there is not sufficient evidence to show any negligence on the part of the railroad company; and further, it is claimed that the evidence as disclosed by the record shows the deceased to have been guilty of contributory negligence, and various rulings of the court during the trial of the case are complained of by plaintiff in error as erroneous.

The facts upon which the case was finally submitted to the jury are, in substance, as follows:

The deceased, at the time of the accident, in October, 1900, was employed by the railroad company at Bellevue, Ohio, engaged in work by which he was known as a "helper" in and about the yards at Bellevue, among other things aiding in keeping them in order and in keeping them clean. In the yards there was what was known as a cinder pit track, which was perhaps altogether 280 feet long, running from the main or "going-out-track," as it was called, off diagonally on a down grade until it finally ran into what is known as the pit, the bottom of which was practically level for a distance long enough to accommodate two cars. At the end of this track the pit was

about three feet and a half deep and at the side of this pit was what was known as the ash pit. Locomotives were run over the ash pit and above it on tracks, and while coal was being put in from the coal house the cinders and ashes were raked out into the ash pit, and from time to time, as needed, open or gondola cars were run into the cinder pit, upon the track, and the ashes from the ash pit, immediately on the other side of the wall, were shoveled into those cars, which were pulled out and the ashes carried away.

On the day that the decedent was killed he got into the cinder pit, where the cinder pit track was between the end of a car and a stone wall, or what was equivalent to a stone wall at the end of this pit where the cars stood. There were two cars in the pit at the time, for the purpose of being loaded with ashes and cinders. One car stood a few feet from the stone wall, the pit, as stated, being about three feet and a half deep. Roe got into this place apparently for the purpose of shoveling some coal or cinders and ashes that had fallen into the cinder pit into the car that stood there. Another man on the other side of the wall was at the same time shoveling ashes and cinders into the car.

Roe, and perhaps others, on this morning were engaged in cleaning up the yards generally, and, in doing that, and as a part of that work, Roe had gotten down into this pit to clean it up, and was doing this with a long handled shovel which he had at the time. While Roe was in this pit, about fifteen minutes after seven that morning (the accident occurring about ten o'clock), a locomotive was run out of the roundhouse for the purpose of attaching it to a passenger train which would be due a short time thereafter. Thomas Peters got upon the locomotive as its engineer, having under him a fireman. Peters took charge of the locomotive, intending to go out on the train as soon as it came in. The train, however, was late, and did not arrive for about two hours and a half.

After Peters took charge of the locomotive, he remained on it with his fireman in the yards on this cinder pit track, the tender being about forty feet from the car in the pit nearest

1904.]

Huron County.

to the locomotive, and after he had been there about two hours, or about ten o'clock, Peters, the engineer, concluded to oil the locomotive. He did so, and ran his locomotive back seven or eight feet toward the pit and there stopped without setting his brakes, letting the locomotive stand on this track without the brakes being set, and this was the negligence complained of by the plaintiff below; and if the engineer was negligent, it is claimed the railroad company is liable under the "fellow servant" act for permitting the locomotive to stand upon this track which was laid at a grade down into the pit without the brakes being set; that, it is claimed, caused the injury complained of.

It appears by the record that shortly after Peters had run the locomotive back a few feet toward the cars, the brakes not being set, the locomotive started down this track, which was at quite a steep grade at this point, toward these two cars in the cinder pit, Roe still being at work at the farthest end of the farthest car, between that car and the stone wall, as before stated. The locomotive struck the car nearest it and pushed that back against the other, so that Roe was caught beneath the rear end of the furthestmost car and the timber that lay there. His legs were first caught and he cried for help, crying out "Go ahead." The cry was heard by various men in the vicinity, and the engineer got off his locomotive and went back to see what had happened, and undertook to pull the cars out of the pit up this grade, but was unable to start the two cars, or rather the record shows that he did not go back until he had made this attempt, and being unable to pull the cars out on a "straight pull," he went back, and, seeing Roe's situation, evidently thought it would be safe to back the locomotive slightly, so as to "take up the slack," as it is called, between the locomotive and the car and between the two cars. He thereupon went back to his locomotive, backed it up perhaps not more than six inches, but it was backed so much that it did in fact push the cars further back, and Roe was crushed between the end of the car and the wall and was killed instantly, or practically so. After backing up this short distance, the engineer started the locomotive ahead, and was then able to pull the cars out, and did so.

It does not appear that Peters, the engineer, knew that Roe was in the pit. Roe had taken no precaution himself to give any warning that he was there, or to have any notice given to the engineer. There is no positive evidence that Roe was ever in this pit before or that anybody else was ever in it, for the purpose of cleaning it out, as he was doing on this occasion. The evidence tends to show that after Peters discovered that the locomotive was moving down the grade, he apparently did all he could to stop the locomotive, but was unable to do so. His attention was first called to the fact that it was running down grade by his fireman, who shouted to him as a train was passing by that his locomotive was moving. Until then the engineer did not realize that it was moving.

It was claimed by the plaintiff below, the defendant in error, that it was negligence on the part of the railroad company, through its engineer, to permit this locomotive, without the brakes being set, to stand upon the track, which was laid at a steep grade at this point, with these two cars upon the track in the pit, and it appearing that Roe's injuries were due to the moving of the locomotive, that the railroad company was liable.

It is claimed on the part of the railroad company that, under this state of facts, no negligence is shown against the railroad company—no want of ordinary care, but that the death of Roe was an accident for which the company is not liable; that all ordinary care was exercised by the railroad company.

It is urged that the company was under no duty at the time to protect Roe against such an accident as this. It is said that there is no evidence in the record that at any time prior to this Roe, or any one else, had got into this pit under these circumstances, with cars standing there, and that the railroad company had no reason to suppose or to anticipate, as an ordinary, prudent person, that any man would be in this pit subject to such a danger as this; and further, that it was negligence on the part of Roe, contributing directly to his injury, to be in the pit under these circumstances; that if he went in there, he took his own chances and assumed the risk.

It is well established by the authorities that no one is liable for a failure to protect a person to whom he does not owe a

1904.]

Huron County.

performance of any duty. It is also well established that an employer is bound to exercise ordinary care to give his employe a reasonably safe place to work and to furnish him reasonably safe appliances with which to do his work, and when such employe is engaged in the performance of his duties, is so situated that he can not protect himself, it is the duty of the employer to exercise ordinary care to see that no injury is done to him.

In the leading case of *Lake Shore & M. S. Ry. Co. v. Lavalley*, 36 Ohio St., 221, where a man was engaged at work under a car, and while so engaged another car and locomotive ran against the car and the man was injured, it was held by the Supreme Court that the man so engaged was entitled to protection.

It is said that the railroad company had no knowledge, and that the engineer had no knowledge at the time that Roe was in this pit—no actual knowledge, and that is undoubtedly true.

There is no claim made, however, that Roe was not properly engaged in the performance of his duties upon the day he was killed. It was part of his work to clean or to help in the work of cleaning up this yard. In the yard, or a part of it, was this cinder pit which was used for the purposes stated, and being used in that way, ashes and cinders would naturally accumulate there, falling off the cars and between the cars and the ash pit. On the other side of the wall were the coal docks, where the locomotives were coaled, and in doing that work, coal would naturally and unavoidably fall into this pit in some amount, and to clean the yards, to put them in good condition and in good order, it was as necessary to clean out this cinder pit where the track was as any other part of the yard; and under general instructions and orders (there is no evidence that Roe had any special orders on that day), he had gotten down into this pit with a shovel to do this work. It seems to us that it can not be said that Roe was guilty of any contributory negligence in doing this, or that he was doing anything at this time that was out of the line of his duty, or anything improper. We are of the opinion that he had the right to presume that while he was engaged in the performance of this work, which it was neces-

sary and proper for him to do, that he would be protected against such an injury as this. In a yard of this kind, with men working about it everywhere, here and there, at the ends of cars and on the tops of cars and under cars, on tracks level with the surface and on tracks in pits and in various ways, it was the duty of the railroad company, through its officers and employes, not to move cars as these cars were moved, without giving some warning or notice of the fact that cars were to be so moved.

After it was discovered that this locomotive was moving, no effort was made to give any notice or warning to any man or men who might be in the pit; no bell was sounded and no whistle was blown, no shouting or calling out, and it seems to us that it might have been presumed or supposed, at least, by the engineer that men might be in this pit at work at that time. There was a man working in the ash pit opposite this pit, in plain sight of the engineer, who had been on his engine for two hours and a half, and he knew these cars were run into the pit for the purpose of being loaded with ashes, and we can not say, as a matter of law, that he would be warranted in presuming that there was no one in this pit that could be injured by cars being run down into it.

Whether the engineer himself was guilty of negligence at this time in letting the engine stand without the brakes being set was a question that was submitted to the jury, and we think was a proper question for the jury to pass upon, and that the jury were warranted in finding that the engineer was guilty of negligence in so doing. The locomotive was standing only about forty feet from those cars—a heavy passenger locomotive standing upon the track laid at quite a steep grade at this point, and to oil the locomotive and run it back six or seven feet in the direction of these cars, and then let it stand without setting the brakes, in view of all the circumstances here, it seems to us the jury were warranted in finding to be negligence. We think that it should have occurred to the engineer that a locomotive left in that way was liable to start any moment down this track, as it did so, and do the damage it did on this occasion, or similar

damage to property or to life. Under the rules of negligence, it seems to us that the conduct of the engineer was not ordinary care. These cars were in plain sight and very near; men were working all about the yards, and a man was liable to be in this pit beyond these cars as well as at any other place in the yards, and to let this locomotive stand without the brakes being set so that at any instant it might start, was not the exercise of ordinary care.

A recent decision of the Supreme Court is cited by counsel for plaintiff in error as in point in this case—the case of *Erie Ry. Co. v. McCormick*, 69 Ohio St., 45. The first paragraph of the syllabus reads:

“Omission of duty is not the foundation of an action unless it results in injury to one for whose protection the duty is imposed.”

We think in this case there was a duty imposed upon the company to protect Roe while he was in the performance of his work.

In this case decided by the Supreme Court, a trackman who had been in the employ of the company for many years was walking across a bridge where there was no place to walk except on the track, and a train approached him from behind. The engineer did not see him on account of a storm. The track being slippery, he was unable to get to the end of the bridge before the train overtook him, and he was killed. It was claimed that the railroad company should have made some provision for a man to walk across the bridge, or should have furnished some place for him to have stepped aside; but the Supreme Court held the company owed no such duty to him, and further found that he had been in its employ for many years as trackman and had full knowledge of the condition of the bridge, and that there could be no recovery for his death.

It does not seem to us that this case is applicable to the facts of the case at bar. Roe was engaged at the time in the performance of his duty, and to perform his duty he was required to go to a place where he could not see the engine, and while in the performance of his duty in such a place as that, doing his work there, the company owed to him a duty not to run

cars or a locomotive down into the pit and crush him. We hold that the verdict was sustained by the evidence. If the negligence of the company were a doubtful question, still it would be a proper question to submit to the jury. If it were a question upon which the minds of reasonable men might differ, it would be a question that a jury should properly pass upon, and under the evidence in this case, their finding will not be disturbed by the court. In *Lake Shore & M. S. Ry. Co. v. Murphy*, 50 Ohio St., 135, the Supreme Court say in the last paragraph of the syllabus:

“It is the duty of a railway company to afford reasonable protection to its employes against dangers incident to their work (*Railway Co. v. Lavalley*, 36 Ohio St., 221, approved and followed). And if, under the circumstances of this case, a rule providing for warning was necessary, and by the exercise of reasonable care on the part of the company, that necessity could have been foreseen, it was the duty of the company to prescribe such rule. Whether it ought to have so provided or not, was a question for the jury.”

The court say further:

“The evidence as to contributory negligence on the part of deceased made a case which, at least, was doubtful, and about which different minds might differ as to the proper inference to be drawn. Such a question can not properly be determined by the court as matter of law, and should be submitted to the jury.”

On page 143 of the opinion, delivered by Judge Spear, the court say:

“Negligence is always an inference from facts put in evidence, as contrasted with a fact which is the subject of direct proof. The proof disclosed facts calling for logical, as distinct from legal, deduction. Where that is the case, the question is for the jury, and not for the court.”

It is claimed, however, that the engineer and Roe did not sustain such relations toward each other as to entitle Roe to bring an action against the railroad company for the negligence of the engineer; in other words, that Roe was not within Section 3365-22, Revised Statutes, or the “fellow servant” act, as it is called,

1904.]

Huron County.

for the reason that Roe and the engineer were fellow servants,—that they were in the same branch of the service. We are of the opinion, however, and hold that they were not fellow servants, and that Roe came within the provisions of this section. The engineer had under him another employe (the fireman) subject to his control. Roe had no one under him or under his control. The engineers' duties were entirely different from those of Roe; he was in the motor department of the company, engaged as engineer on the locomotive, entirely separate and distinct from Roe's work. Roe was engaged as one of a gang of men in cleaning the yards. We think they were engaged in different branches of the service, and that therefore the negligence of the engineer, under this statute, was the negligence of the company, and the company is liable therefor.

We have discussed this general question in a case in this county—the case of *Hill v. Railway Co.*, 22 C. C., 291. The opinion was delivered by Judge Parker.

It is claimed that the court erred in its charge to the jury on the question of damages and in refusing to charge as requested by counsel for the railroad company. The court was asked in request number five to give an instruction to the jury upon the degree of proof with which the damages to the next of kin of the deceased must be sustained or must be established to warrant the jury in returning a verdict for the different elements that enter into damages of this kind. The court was asked to charge as follows:

“If, under the instructions now and which shall hereafter be given you by the court, you find for the plaintiff, and so come to determining the amount of the damages which should be awarded him, the court says to you that amount must be strictly limited to the amount of pecuniary damage, that is, to the amount of money which it is reasonably certain from the testimony in this case that the widow of John Roe, deceased, and his children would have received from him had he not been killed. In arriving at this amount, you should consider his age at the time he died; how long he would have been reasonably certain to have been able to have continued to earn money as a laborer, and from this time should be subtracted the time, if any, which he was reasonably certain to have lost from sickness or increasing age. From the amount of money which you find he would have thus been reasonably certain to have earned had he not

been killed, must be subtracted the amount of money which he would have required for his own clothing, board and other personal expenses, in sickness and in health had he lived, and you should consider such other facts as appear in the evidence bearing upon the amount of money which the widow and children were reasonably certain to have received from John Roe had he not been killed. When you have thus arrived at the amount of money which the widow and children of John Roe would have been reasonably certain to have received from him had he lived, in the form which the court shall direct, you should determine what the present worth of that amount is, for the reason that if anything is paid as the result of this trial, it will be paid in a single lump sum, and as of the first day of the present term of court, whereas, if John Roe had lived, the money which the widow and children would have received from him, would have been earned and have come to them as time passed, through such a number of years as you shall find under the instructions given you, he would have been able to have worked and earned money at his occupation, which appears from the evidence in this case to have been that of a common laborer."

This was asked to be given before argument, and was refused. The court, in its general charge to the jury after argument gave an instruction which was similar to this in many respects, but differed in one particular, and if the defendant below was entitled to this instruction, it was entitled to have it given before argument, as requested.

The court, in its general charge to the jury, gave this instruction substantially as requested except that it changed the phrase "reasonably certain" to "reasonable expectation," or "might reasonably expect." The substance of it was that instead of saying to the jury they could only allow the plaintiff the damages which were reasonably certain would ensue to the next of kin on account of the death of Roe, they might allow such damages as might be reasonably expected to follow from his death. It is urged that the instruction as requested was correct and that it was error to refuse it, and a decision of the Supreme Court is cited to sustain this contention—the case of *Pennsylvania Co. v. Files*, 65 Ohio St., 403, where the Supreme Court say in the second paragraph of the syllabus:

"Where prospective damages from an injury are claimed, they should be limited by the court in its charge to such as may be reasonably certain to result from the injury."

1904.]

Huron County.

This was an action for personal injuries where death did not ensue, and the court held that for the prospective damages to plaintiff in the way of pain, or otherwise, the trial court should have said to the jury that plaintiff could only recover for that which it might be reasonably certain would result from the injury.

In our judgment, this is not the rule when applied to a death case, under the statute. This action is brought under Section 6135, Revised Statutes, and were it not for this statute, no action could be maintained for the death of a person. The action is unknown at common law; it is purely a statutory action, and the personal representative of the deceased is entitled to recover for the benefit of the next of kin, just as the statute says he is entitled to recover, and in an amount which the statute warrants. Section 6135, Revised Statutes, provides:

“Every such action shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person; and in every action the jury may give such damages, not exceeding in any case ten thousand dollars, as they may think proportioned to the pecuniary injury resulting from such death, to the persons respectively for whose benefit such action shall be brought.”

The damages that are allowed to be recovered in a case of this kind are, to be sure, more or less speculative. They must be. How long Roe might have lived if he had not met with this accident, we can not tell, or how much he might have earned in the future can not be told with certainty; or how much he might have given to his wife or children, the jury could not tell absolutely, with certainty. They can only judge from what he has done in the past, from what he has earned in the past, from his health and his prospects of life, as shown by the evidence. But the statute provides that the jury (after taking all these things into consideration) shall allow such sum, not exceeding ten thousand dollars, as they may think proportioned to the pecuniary injury resulting from such death. The statute does not provide that they shall give such sum as they are reasonably certain will result, but such sum as they may think

under the evidence is proportionate to the pecuniary injury resulting from such death, and it seems to us that this is to be established by a preponderance of the evidence like any other question in the case; that it would be going beyond the statute to say that the jury could only return such damages as they were reasonably certain the next of kin or children, or parent, as the case might be, would sustain.

This question, we think, has been settled by the Supreme Court, in *Grotenkemper v. Harris*, 25 Ohio St., 510. The Supreme Court say:

“Under the act requiring ‘compensation for causing death by wrongful act, neglect, or default,’ etc., persons who had no legal claim for support upon the deceased may, as next of kin, have an action maintained for their benefit, to recover the compensation allowed by the statute.

“In such cases, in determining the pecuniary injury resulting from the death, the reasonable expectation of what the next of kin might have received from the deceased had he lived, is a proper subject for the consideration of the jury.”

On page 512 of the opinion the court say:

“The reasonable expectation of such pecuniary benefit to the next of kin is what the jury are to ascertain and allow; and that expectation may consist of what a person may give his next of kin while living as well as what they may inherit from him at his death.”

The court of common pleas, it seems to us, was clearly within the law as laid down by the Supreme Court, in refusing to give this request and in giving the instruction that was given to the jury in the general charge. The request, however, is faulty on another ground, in that it does not include any element of loss which may have resulted to the children and wife of the deceased on account of their being deprived of inheriting after acquired property from the deceased, at his death. That is an element of damage that may be considered by the jury, as well as the loss of benefit from the deceased during his lifetime. A case can readily be conceived of, if a man was engaged in large business enterprises and amassing large profits from year to year, where this expectation of inheritance would be a large element of probable damage to his wife and children.

1904.]

Huron County.

We hold, therefore, that there was no error in the court refusing this instruction.

Another portion of the charge is criticised and objected to as erroneous. The court said to the jury:

"In determining whether such ordinary care was exercised by the defendant company, you should consider the nature of the work and the appliances therefor and what, if any, apprehension of danger the defendant had, or, in the exercise of ordinary care, should have had."

Then follows this, which was objected to and claimed to be erroneous:

"You may consider also what knowledge, if any, the company possessed as to the experience, qualifications and fitness of the men whom it employed to do the work, including John Roe."

It is probably true that the issues in this case did not call for any instruction to the jury upon this question of experience or of fitness of the men engaged in this work, including John Roe. But it is very common practice where a question of contributory negligence is involved to instruct the jury that they may consider all the facts and circumstances, including the man's experience in the work, etc.; but there was, in fact, no claim made here that John Roe was inexperienced, or that the engineer was inexperienced. It was perhaps an inadvertence on the part of the court, in giving an instruction often given. But we are of the opinion, taking the whole charge together, that there was nothing in this to the prejudice of the plaintiff in error. It is not of sufficient consequence to warrant a reversal of the case. In our judgment the jury were not misled by this remark of the court, reading it in the light of the whole charge which, as a whole, was full and very fair. After a careful review of the record, we find no error to the prejudice of the plaintiff in error, and the judgment of the court of common pleas will therefore be affirmed.

C. P. & L. W. Wickham and John H. Clarke, for plaintiff in error.

Jesse Vickery, for defendant in error.

DIVORCE AND ALIMONY.

[Circuit Court of Cuyahoga County.]

JOHN T. NAUMAN v. CATHERINE NAUMAN.

Decided, June 10, 1897.

*Divorce—Decree for, is Operative from the Date of Its Rendition—
Can not be Reopened Upon Motion Filed Two Days Later—Where
One of the Parties has Married in the Meantime—Journal Entry
not Necessary to Give Validity to Decree—Temporary Alimony—
Motion for, Will be Denied, When.*

1. Failure to enter a decree of divorce upon the journal does not deprive it of validity, but where the granting of the decree has been noted on the appearance docket it will be regarded as operative between the parties from its rendition.
2. A court is not authorized to reopen a divorce case upon a motion filed two days after the decree was rendered, where it appears that on the day the motion was filed one of the parties without knowledge of the filing remarried.
3. A proceeding for divorce is terminated by an order of court that the petition be dismissed, and the fact that no reference is made in such order as to the defendant's cross-petition does not give to the defendant the right to thereafter move for an allowance of temporary alimony.

MARVIN, J.; HALE, J., and CALDWELL, J., concur.

This case comes into this court upon a petition in error, the purpose of the suit being the reversal of the judgment of the court of common pleas of this county granting to Catherine Nauman alimony to be paid by John Nauman pending the suit. The facts are substantially these: Some time in 1895, John Nauman filed a complaint in the court of common pleas praying for a divorce from his wife, Catherine Nauman. Thereafter she filed an answer or cross-petition in the case. On March 14, 1896, that case was heard and a decree of divorce was made by the court in favor of the plaintiff.

On March 17, 1896, John Nauman remarried, and on that same day a motion was filed by Catherine Nauman in this case for a new trial. On March 21, 1896, the motion was sustained; the court heard evidence and ordered the petition of the plaintiff

1904.]

Cuyahoga County.

iff dismissed at his costs, and said nothing as to the cross-petition of Catherine Neuman, and no entry or order was made concerning the case. Later on, some time in January, 1897, Catherine Nauman filed a motion entitled in the case of which I have already been speaking, asking that alimony be decreed pending the hearing of her cross-petition in that case. Before the motion was filed, however, Catherine Nauman had filed a separate petition in another case in the court of common pleas, praying for alimony against John Nauman. The question, then, is whether the court of common pleas had any jurisdiction to make the order it did make, that John Nauman should pay alimony pending the hearing of this cross-petition in that original case.

No entry was made upon the journal prior to the hearing of the motion for a new trial. The first journal entry made in the case was the entry dismissing the petition of John Nauman. An entry was, however, made on the appearance docket showing that these things took place on March 14th, to-wit, a decree of the court granting Nauman a divorce, and on March 17, motion for a new trial. It was urged upon the hearing that because no entry had been made upon the journal of the court, therefore there was no divorce. That counsel making that claim are mistaken, is settled in numerous cases, and settled in Ohio beyond any question, and in this court, in the case of *State v. Meacham*, 6 C. C., 31, in which the opinion was delivered by Judge Upson. He said in the first paragraph of the syllabus:

“The clerk of the court of common pleas must, under the statute, enter on the journal all orders and acts of the judge of the court during the term. All changes should be subsequently entered by the clerk without omission of any former entry.”

In the fourth paragraph of the syllabus he said:

“In an appealable case, after notice of appeal and bond has been given, the case is *eo instanti* in the circuit court, although the clerk has journalized neither the decree nor the notice of appeal; and the rule that a judgment in a case is within the control of the court during the term at which it is rendered,

and that the case does not go beyond the power of the court until the close of the term, has no application to such case."

In the opinion Judge Upson says, page 337:

"In the nature of things, a judgment must be rendered before it can be entered; and not only that, but though the judgment be not entered at all, still it is none the less a judgment. The omission to enter it does not destroy it, nor does its validity remain in abeyance until it is put on the record."

That is not only the law in Ohio, but, so far as I have been able to examine the text books, it is the law everywhere.

I call attention to the case of *Cook, Estate of*, 77 Cal., 220 (19 Pac. Rep., 431), in the second paragraph of the syllabus:

"A judgment of divorce becomes operative between the parties at its rendition, notwithstanding it be not entered by the clerk until a subsequent date."

The fourth paragraph of the syllabus reads:

"After the rendition of a judgment it is the duty of the clerk to enter it; and the fact that the entry was made at the request of a person not a party is immaterial."

The sixth paragraph of the syllabus reads:

"A judgment of divorce rendered in favor of a party during her lifetime may be entered after her death."

In this case it was the matter of the settlement of the estate of a deceased woman. The question of who was entitled to distribution of the estate was affected by the question, whether when she died she was the wife of Cook or of somebody else to whom she was thereafter married. The examination of the record shows that it was quite a number of years; the divorce was granted in 1880 and the death occurred quite a number of years thereafter, and yet the court in this case ordered the decree to be entered as of the date when the judgment was announced. In the case of *Clink v. Thurston*, 47 Cal., 29, in the opinion this language is used:

"It was objected that the judgment was not signed either on the roll or elsewhere by the judge or clerk of the court. It is

1904.]

Cuyahoga County.

not required that a judgment should be signed by the judge or clerk, and as the judgment roll was an original record of the court in which it was offered, it required no exemplification."

In this case before the court, the entry had been made upon the minutes, and we hold that the fact that nothing had been entered upon the journal is wholly immaterial. But it is provided by our statutes that a motion for a new trial may be filed in a case within three days after the rendition of a judgment, and the court may hear such motion; and it is urged that as a motion is here filed within three days, and the court subsequently heard that motion and granted it, and thereafter heard the case upon the petition and dismissed the petition, that these parties were not divorced. Without undertaking to say what the court would hold if the fact were not in this case that Nauman was remarried before that motion was heard, and probably before it was filed, though the record does not show whether he was married before it was filed or not—he was married on the same day it was filed—the question here is, whether that being true, there is any question of public policy requiring this case to be treated differently from a decree in another kind of a case.

We are cited by counsel for the defendant in error here to numerous cases to show that judgments in divorce should be treated as judgments in other cases. The case is cited to us in 104 Mass., 297. In the opinion it reads:

"Aside from a well justified reluctance to nullify decrees in cases where second marriages have been contracted, the tribunals of this country have, with few exceptions, treated final decrees in divorce precisely as final judgments in ordinary civil actions."

That is true in the case of *State v. Railway Co.*, 38 Minn., 246, 252 (36 N. W. Rep., 870), where the court goes so far as to say that the judgment is to be treated as any other judgment may be treated in cases after decree being entered. The same is true of all cases cited except, perhaps, two in New Hampshire, in which I find nothing which seems to us in any way to bear upon the question now under consideration. As strong a

case as is cited to us on the proposition that a judgment for divorce may be reopened, as any other judgment, is *Wisdom v. Wisdom*, 24 Neb., 551 (39 N. W. Rep., 594).

That case cited a case in Ohio which is relied upon by the plaintiff in error here (*Parish v. Parish*, 9 Ohio St., 534), and expressly holds that that is not the law in Nebraska. It is urged here that *Parish v. Parish*, *supra*, is at variance with the policy of the law of Ohio, and is not in any event authoritative in this case.

The case of *Parish v. Parish*, *supra*, was one in which it was sought to open a judgment for divorce at a subsequent term. The reasoning of the court in that case was based upon public policy, which requires that the domestic relations of parties, especially that growing out of the marriage contract, is of such interest that the case is not to be treated as a judgment in other cases; but instead of that not being now the law in Ohio, a case was decided upon October 8, 1895, by the Supreme Court of this state, only reported in brief, but found in *John v. John*, 1 O. S. C. D., 356. That was a case like *Parish v. Parish*, *supra*, where if the allegations of the petition were true, a gross fraud had been perpetrated on the court. We can not well conceive a case where a greater fraud was perpetrated, according to the petition than that case of *Parish v. Parish*, *supra*, and the court said in passing upon it that it was to be hoped for the honor of human nature that the allegations were not true; and the demurrer was sustained in that case; a fraud upon the court as to jurisdiction, as was also true in the case of *John v. John*, *supra*. So there is no question but that the ground laid down in *Parish v. Parish*, *supra*, is still the law of Ohio. But does that apply to the present case? It is not exactly such a case as this, and, as I have already said, without undertaking to say what this court would do if a new marriage had not been made, we think that must be considered, whether this court might grant a new trial and rehear the case.

In *Lewis v. Lewis*, 15 Kan., 181, an opinion was delivered by Justice Brewer, and he cites in that case the case of *Bascom v. Bascom*, 7 Ohio (pt. 2), 125. Justice Brewer, in commenting upon the case, said:

"In *Bascom v. Bascom*, *supra*, the court decided that a decree of divorce was not subject to review in the Supreme Court. It was conceded that the statute provided that divorce cases should be governed by the rules respecting proceedings in chancery, and that in chancery cases the right of review existed; but there was this difference: in divorce cases the testimony was oral; in chancery, by depositions. Upon this difference the court concluded there was no right of review of decree of divorce. Manifestly a controlling consideration was the danger of intermediate marriage. It used this language in the opinion: "When a divorce is granted upon which one of the parties contracts new relations, and a third party acquires rights, it can not be that a process could be had to reverse a decree, the consequence of which would be a severance of all those new relations. Such anomalous mischief can not be engrafted on the practice of our courts, except by clear and explicit legislative enactment. That, we feel confident, can never take place. All the reasons that render a decision upon facts by a jury conclusive between the parties, unite in requiring that the decision of a court, upon facts, on the hearing of a petition for divorce, should be final, and stand beyond the reach of judicial revision.' "

An examination of the case of *Bascom v. Bascom*, *supra*, will show that Justice Brewer has correctly stated the position of the court.

I call attention to that case to show the opinion of Justice Brewer as to intermediate marriage. In the case of *Bingham v. Miller*, 17 Ohio, 445, the court held that—

"Divorces are the subject of judicial, not legislative, action, and the Constitution confers upon the Legislature no power to grant them, but to avoid the consequences which would result from declaring all those void which have been granted by the Legislature during the existence of the state, rendering illegitimate the issue of second marriages, the court will pronounce them valid."

We think that in view of the fact that remarriage had taken place in this case, the court was not authorized to reopen the case, that the case was ended; but in any event, we hold that there was no case pending in the court of common pleas at the time this motion for alimony was filed, even though we should be wrong in what had already been announced. The

last decree of the court, the one of March 21, was an order that the petition of the plaintiff be dismissed; and there being no continuance, and nothing said as to the cross-petition then filed, the case, if it were not already ended, then the effect of what was then done was to end the case.

The case found in *Petersine v. Thomas*, 28 Ohio St., 596, I cite as establishing that whatever was then pending in this case was ended when that judgment was made. The first clause of the syllabus reads:

“When a matter is finally determined in an action between the same parties by a competent tribunal, it is to be considered at an end, not only as to what was determined, but also as to every other question which the parties might have litigated in the case.”

Now the whole matter was pending in that court—petition and cross-petition; if we were wrong in what we have already said, the case was ended by the first decree. The court should not have interfered with the first decree. That ended the case, if it was not at that time ended; but our holding is that that case was ended by the decree of the fourteenth, and with these views, we reverse the judgment of the court of common pleas.

E. C. Schwan, for plaintiff in error.

Allen T. Brinsmade, for defendant in error.

1904.]

Auglaize County.

WILLS.

[Circuit Court of Auglaize County.]

LYDIA M. WEST, AS EXECUTRIX, ETC., v. LILLIAN KNOPFENBERGER.

Decided, November 25, 1903.

Testamentary Capacity, although Body and Mind are Enfeebled—To Show Lack of the Burden of Proof is upon the Contestants—Defendants not Required to Affirmatively Show Testamentary Capacity—Jury Must Find that Testator did not Exercise his Own Free Will—Hypothetical Question Containing Indicia of Lack of Testamentary Capacity Competent—Expert's Opinion of Value, when—Materiality of Facts in Hypothetical Question not for the Jury—Questions to Jury Need be Answered only in Case of a General Verdict.

1. A person may possess testamentary capacity even though enfeebled in body and mind by age and disease; though his memory may be impaired in a degree, and his mind disturbed by hallucinations or delusions (not necessarily influencing the mind in making testamentary disposition of property); though his mind may suffer discomposure and derangement in consequence of melancholy, grief, misfortune, sickness or disease (not of a nature to deprive him of the rational faculties common to men); and although he lacks contractual capacity or capacity to transact the ordinary business of life. Hence, it is improper to charge the jury in a will contest that "in order to be able to make a will it is necessary that a man shall have mental capacity sufficient for the transaction of the ordinary business of life; such an instruction is not cured by giving elsewhere in the charge proper rules and *criteria* for determining testamentary capacity, but which do not qualify such improper charge.
2. The order of probate is *prima facie* evidence of the due execution, attestation, and validity of a will, and when such order is offered in evidence in an action to set the will aside, the burden of proof is upon the contestants to prove by a preponderance of evidence that testator was of unsound mind and memory at the time of executing his will, or was under restraint or control of undue influence.
3. A charge from which the jury may assume that the burden of proof is upon the defendants in a will contest to show affirmatively the testamentary capacity of testator, is improper; the charge should require contestants to show affirmatively lack of testamentary capacity before the will could be set aside.

4. An instruction that there is no valid will unless the jury believe from the evidence that testator, of his own free will, not only intended to make such disposition of his property as made in the alleged will, but was also capable of knowing what he was doing, understanding to whom he was giving his property and in what proportions, and of whom he was depriving it as his heir and who would otherwise have inherited it, and was also capable of understanding the reasons for giving or withholding his bounty to them, is improper; the charge should have been to the effect that the will was valid unless the jury find from the evidence that testator did not make such disposition purposely and of his own free will.
5. A hypothetical question propounded to an expert by the contestant in an action to set aside a will which indicates what contestant claims to be the physical and mental condition of testator at the time of making of his alleged will, and that as a consequence of such condition he was of unsound mind, which *indicia* of lack of testamentary capacity are controverted in the case, is competent where there is evidence tending to establish the facts assumed in the question; and while an answer directly responsive to such question to the effect that testator was mentally unsound would be insufficient to set the will aside, yet it is competent as tending to establish lack of testamentary capacity.
6. The opinion of an expert based upon facts assumed in a hypothetical question is of no value unless all the assumed facts forming the basis of such opinion are found by the jury to be true; and where such hypothetical question assumed the existence of various facts not apparently immaterial, which the jury may have found to be not established by the evidence, and there is nothing in the evidence to indicate that the expert deemed such assumed but unproved facts immaterial or unessential to the basis of the opinion testified to, it was improper to charge the jury to the effect that such opinion may be entitled to *some* weight or value though the facts assumed in the question upon which the opinion was based may not be true, provided the jury should find that the facts were substantially as assumed. Therefore, a charge that "the weight to be given to *such opinion* depends *largely* upon * * * whether or not the question and statement of facts contained in it, upon which the opinion was expressed or based, was a true statement of the facts as to testator's condition, as you find it to exist from the testimony," and that "if the question or the statement of facts put to the witnesses upon which they have expressed an opinion, do not embody the facts as you find them, to have been established by the testimony, then the opinion of said experts is of *little, if any value* in determining the question in the case." "If, however, the questions embody *substantially* the facts as you find them to have existed," then the opinions are

1904.]

Auglaize County.

- to be given such weight as the jury think them entitled to, is held to be erroneous.
7. It is not within the province of the jury to determine what facts assumed in a hypothetical question propounded to an expert are material or immaterial. The questions should be so framed as to include only such facts as the evidence may warrant the jury, in finding to exist, and not so as to allow the jury to speculate upon what is material and what immaterial. *A fortiori*, is this true where the question assumes but two main facts both of which seem to have been regarded as material by the experts.
 8. The court may properly refuse to submit questions to the jury for answer under Section 5201, Revised Statutes, when the request therefor fails to contain the condition that such questions need only be answered in case a general verdict is rendered.

PARKER, J., (sitting in place of Mooney, J.); DAY, J., and NORRIS, J., concur.

The proceeding in the court below was by Lillian Knoppenberger, defendant in error herein, against Lydia M. West, as executrix of the last will and testament of James Knoppenberger, deceased, and as sole devisee and principal legatee of said decedent, to contest said last will and testament on the grounds:

First. That at the time of the making of said will said decedent was mentally incapacitated from making a testamentary disposition of his property; and

Second. Because said Lydia M. West had exercised an undue influence over his mind causing him to devise and bequeath his property to her.

The verdict of the jury was in favor of the contestant generally, finding that the paper writing is not the last will and testament of James Knoppenberger, deceased. A motion for a new trial was made on various grounds, involving among other questions those which we shall discuss, which motion was overruled and judgment was entered upon the verdict.

The principle grounds urged in this court against said verdict and judgment are:

First. That the verdict is against the weight of the evidence.

Second. That certain hypothetical questions asked by counsel for defendant in error of expert witnesses were improper in form, not being authorized or justified by any evidence adduced.

Third. That the court erred in failing to charge certain propositions submitted by counsel for plaintiff in error.

Fourth. That the court erred in refusing to submit certain interrogatories to be answered by the jury at the request of counsel for plaintiff in error; and

Fifth. That the court erred in its charge on the subject of testamentary capacity; also on the subject of expert testimony adduced in response to hypothetical questions, and also with respect to the burden of proof. Our conclusions upon other questions seem to us to make it unnecessary and inadvisable to consider and pass upon the weight of the evidence, and we shall not do so. For the same reasons we shall not pass upon the question whether the court should have charged the jury that there was no evidence tending to show undue influence, and that therefore they should find on that question in favor of the defendant below. The hypothetical question to which objection is urged, submitted to several physicians who were witnesses in the case, was as follows:

“What in your opinion would be the condition of a man’s mind as to being sound or otherwise, if in 1889 or 1890 he had contracted the disease of syphilis, and in July, 1898, was found in the last stage of syphilis, with pains in his head about the base of the brain and throughout the head, with the scars of syphilitic ulcers on his lower limbs, and was on the 2d of November, 1898, suffering in the last stage of cancer of the lower bowel, not having had an operation of the bowels for seven days?”

The question indicates what the contestant claimed was the physical and mental condition of the testator at the time he executed the alleged will, *i. e.*, that in consequence of the physical infirmities described his mind was unsound. That the testator was afflicted with syphilis was denied, and that he had not had a movement of the bowels for so long a time as supposed in the question was also controverted, but it can not be said that there was no evidence adduced tending to show that this was the physical and mental condition of James Knoppenberger at that time; and while it is true that an answer directly responsive, such as was given by certain of the witnesses to the effect that

1904.]

Anglaize County.

he was then mentally unsound, would not be sufficient to warrant the setting aside of the will since one need not be in all respects mentally sound to possess testamentary capacity, yet such evidence would be competent and would tend to establish, or would be a step towards establishing such mental condition as would render one incapable in law of making a valid will. We therefore hold that the court did not err in allowing this question to be asked and answered.

From the record it is uncertain to our minds whether the four propositions submitted on behalf of the plaintiff in error to be charged to the jury should be regarded as a series, a defect in any one of which would justify the refusal of all, or whether they should be regarded as separate, complete and independent propositions.

The court was asked to charge these propositions, and we are of the opinion that the subsequent waiver of the request to charge the same before argument did not excuse the court from giving them at all, and it is apparent from the record that the court so understood the matter. We are agreed that in the main, these four propositions are correct; also that the substance of most of them was given in the charge to the jury; we are not quite agreed as to whether they should be regarded as a series or independent propositions, nor as to whether the third proposition to the effect that there was no evidence tending to show that James Knoppenberger was under undue influence or restraint in attempting to make his last will and testament should have been given, and since the substantial question involved in the alleged error of the court in its charge may be discussed and disposed of without special reference to these propositions which he was requested to charge, we will not pass upon the question whether the court erred in failing to charge as requested.

The request to the court to submit certain questions of fact to the jury appears in the record as follows:

"Thereupon the defendant, Lydia M. West, requested the court to submit the following questions of fact to the jury with the direction that they answer the same."

Then follows a series of seven questions, all of which the court refused to submit to the jury. In view of the form of

the request it seems clear that the court did not err in refusing to submit these questions, since the Supreme Court has held in the case of *Gale v. Priddy*, 66 O. St., 400, reading from the second paragraph of the syllabus:

“Revised Statutes, Section 5201, so far as it relates to special findings upon particular questions of fact, is mandatory only when the request therefor contains the condition that the questions which are submitted shall be answered in case a general verdict shall be returned.”

It will be observed that this request did not contain the requisite condition.

Coming now to the charge of the court, and taking up first the part relating to testamentary capacity, we find that the court charged as follows in the very introduction of this question to the jury:

“In order to be able to make a will it is necessary that a man shall have mental capacity sufficient for the transaction of the ordinary business of life,” etc.

This, we think, is clearly erroneous. Under the authorities one may be lacking in capacity for the transaction of the ordinary business of life, and lacking in contractual capacity, and yet he may have testamentary capacity. See *Paige on Wills*, Section 96; *Underhill on Wills*, Sections 87-88-89 and 139; *Guild v. Hull*, 127 Ill., 523 (20 N. E. Rep., 665); *Campbell v. Campbell*, 22 N. E. Rep., 620; 6 L. R. A., page 168. See also *Beach on Wills*, Section 101; 1st *Jarmin on Wills*, 5th American, from 4th London edition, notes by Randolph Talcott at page 96.

In the text books referred to, many cases are cited in support of the proposition that the same degree of capacity is not requisite to the making of a valid will that is requisite to the making of a contract or the management of the ordinary business of life. The authorities seem to be quite uniform in support of this proposition.

Elsewhere in the charge proper rules and criteria for determining whether testamentary capacity existed are well stated by the trial judge, but this erroneous rule is nowhere qualified and serves itself as a qualification of and addition to all other rules

1904.]

Auglaize County.

stated. We regard this as serious, prejudicial and fatal error in the charge.

As to the burden of proof, the rule was correctly stated by the learned judge, when he said "that the order of probate being *prima facie* evidence of the due execution, attestation and validity of the will, it devolves upon the plaintiff to prove by a preponderance of the evidence that at the time said will was executed, the said James Knoppenberger was not of sound mind and memory, or that at that time he was under restraint or control by some undue influence," and in other parts of the charge statements are made consistent with this, bearing upon the question of the burden of proof; but on the other hand, in various places statements are made as to results that should flow from finding or not finding certain facts that in effect shift the burden of proof upon the defendant; for instance, it is said:

"I say to you that the will in this case is not a valid will unless the jury believe from the evidence under the rules I will hereafter give you, that the testator, James Knoppenberger, deceased, not only intended to make such disposition of his property as is therein made, of his own free will, but was also capable of knowing what he was doing, of understanding to whom he was giving his property, and in what proportions, and of whom he was depriving it, as his heir, who would otherwise have inherited it, and was also capable of understanding the reasons for giving or withholding his bounty to them."

Manifestly this is wrong, and should have been stated in this way:

"I say to you that the will in this case is a valid will, unless the jury find from the evidence that the testator, James Knoppenberger, did not intend to make such disposition of his own free will," etc.

Reading again from the charge:

"If you find from all the evidence, facts and circumstances in this case, that at the time this paper writing was executed the testator had sufficient mental capacity to understand, unaided, the nature, the amount, the kind of his property and the claims and the names of those entitled to his bounty, then you may pass to the second proposition," etc.

Again:

“If you find from the evidence that the paper writing purporting to be the last will and testament of James Knoppenberger is the product of a sound and disposing mind as I have described to you, that it was executed by him, that he understood it, that he knew of what property he was possessed and the persons that would naturally be entitled to his bounty, if he comprehended and understood his true relations to this plaintiff and other members of his family, and that at the time he was not under any restraint or coercion as I have described to you, you will find that this paper does constitute the last will and testament of James Knoppenberger, deceased.”

As legal propositions applicable to the facts in issue, these statements are unassailable; clearly such a state of facts as is stated provisionally would support the will, but the trouble with these statements is that they naturally give the jury to understand that they are to find affirmatively that such a state of facts exist before they could rightfully return a verdict sustaining the will, whereas the matter should have been set before them so they would have understood that unless they found affirmatively the antitheses of the state of facts recited, or some of them, they must sustain the will. In this also we find that the court erred to the prejudice of plaintiff in error.

On the subject of the hypothetical question before referred to and the evidence adduced in response thereto, the court charged the jury as follows:

“As bearing upon the question in the case, both plaintiff and defendants have called medical experts, to whom hypothetical questions have been put for the purpose of enlightening you upon the issue between the parties in this case; that is, persons of experience in the medical profession have been called to whom questions embodying certain statements as facts in the case have been put, and upon which statements of facts the witnesses have given their opinions. This is testimony that should be considered by you in determining this question between the parties; the weight to be given to it depends largely upon the skill and the experience and the knowledge of the experts, their learning, their capacity, and whether or not the question and statement of facts contained in it, upon which the opinion was expressed or based, was a true statement of the facts as to the testator’s

1904.]

Auglaize County.

condition, as you find it to exist from the testimony in this case. If the questions or the statement of facts put to the witnesses upon which they expressed an opinion do not embody the facts as you find them to have been established by the testimony, then the opinion of said experts is of little, if any, value in determining the question in this case. If, however, the questions embody substantially the facts as you find them to have existed, and from the testimony, then you should give to them such weight, as, in your judgment, in the light of all the testimony and the surrounding circumstances in this case, they would be entitled to in the determination of these questions."

This charge seems to have been copied almost literally from Section 171 of Kincaid's Instructions and Entries, and is said to have been given in a charge in some case. It does not appear to have received the approval of any court of last resort, and so far as we know it has never been questioned or tested. In our opinion it is faulty in several particulars. It implies that the answers of the expert may be entitled to *some* weight, though the statement of facts assumed in the hypothetical question should be found by the jury to be untrue. Observe the language:

"This is testimony that should be considered by you in determining this question between the parties; the weight to be given to it depends *largely* upon * * * whether or not the question and statement of facts contained in it, upon which the opinion was expressed or based was a true statement of the facts as to the testator's condition as you find it to exist from the testimony in this case."

It also implies that the testimony may be regarded as having *some* value though the hypothetical question did not embody the facts as the jury might find them to have existed. Note this language:

"If the questions or statments of facts put to the witnesses upon which they expressed an opinion do not embody the facts as you find them to have been established by the testimony, then the opinion of said experts is of little if any, value in determining the question in this case."

The paragraph immediately following may have corrected this fault in a measure if regarded by the jury as a modification of the paragraph just quoted, but it is not clear that it was so in-

tended or should have been so regarded, and even if so intended and regarded the charge would not be quite right, but would still involve the grave fault that it left it to the jury to say what was a substantial compliance of the requirements of the hypothetical question in the way of proving facts assumed; or, in other words, what facts assumed were material and what were immaterial. In this particular case we regard this as a grave fault and error for the reason that the hypothetical question is brief and embodies but few assumed facts—in fact, but two main facts both of which seem to have been regarded by the experts as material, to-wit: First, that the testator at the time he made his will was in the last stages of syphilis with consequent pains and disabilities; and, secondly, that at that time he was suffering in the last stage of a cancer of the lower bowels and had not a movement of the bowels for seven days. Usually hypothetical questions include many facts, some of which may properly be deemed material, and others immaterial, and it is never safe to leave a jury to speculate upon what is material and what is immaterial of the assumed facts of a hypothetical question. The examiner should so frame his questions and vary their forms as to include in some of them, at least, only such facts as the evidence may warrant the jury in finding he had established. If he should fail to do this, the legitimate result would be a disregard by the jury of the answers given to such question. But even if a jury could be warranted in any case in speculating upon what was material and immaterial in a hypothetical question, or, in other words, whether the facts assumed had been substantially proven, it is clear to us that no such latitude should be given to a jury in this case where the hypothetical question assumes but two main facts, both of which seem to have been regarded by the experts testifying as material facts.

As has been stated though the answer called for by the hypothetical question before mentioned would not, if relied upon, determine whether the testator was possessed of testamentary capacity, yet it tended to throw light upon the question and therefore was admissible. Though the jury should believe and rely upon an answer to the effect that the testator was not sound mentally at the time he made his will, that alone would not jus-

tify it in setting the will aside. However it would be a fact competent to be proved because tending with other evidence to show testamentary incapacity, and because of such answer to the hypothetical question it was proper for the court to charge upon that head. The charge however should have set forth clearly that the jury must find the facts to have existed as *as-Rogers*, Expert Testimony, Section 32, and cases there cited).

In a case in the Supreme Court of Michigan, Mr. Justice Morse says:

“The answer of an expert witness to a hypothetical question must be supposed to rest on all the facts stated in such question; and if one of these facts is not found in the case, the jury must discard the answer to the question, under all the authorities. And the reason of the rule is founded on principle, and is clearly apparent without argument.”

So in another case before the same court, the trial court charged the jury that it was important for them just as far as they could, to look into the evidence and determine whether the facts assumed in the hypothetical question actually existed, adding “because if one fact supposed to be true, included in the question, is untrue, not supported by the evidence, the opinion of the doctor would be valueless. He gives his opinion upon a certain state of facts supposed to be true, and we don’t know what his opinion would be if one of these facts were withdrawn.”

The cases cited from Michigan are *Turnbull v. Richardson*, 69 Mich., 400, 420; *People v. Foley*, 64 Mich., 48, 156. See, also, *Blashfield*, Instructions to Juries, Section 246. I quote a part of the section:

“It is proper to instruct the jury to disregard the evidence (opinions) of expert witnesses based upon hypothetical questions, if the jury should find the hypothesis involved in the question to be not in accordance with the facts.”

And after pointing out exceptional cases where the hypothesis assumed need not be fully sustained by the evidence, the author quotes the following instructions given in *Hall v. Rankin*, 87 Iowa, 261, and condemned by the Supreme Court of Iowa, to-wit:

“If the facts stated as a basis for the hypothetical question propounded to the medical experts in this case were not substantially correct as shown by the evidence introduced on the trial of the case, then the opinion given by the experts based upon such assumed state of facts is entitled to but little or no weight as may be determined from the evidence. That is to say, the hypothetical facts upon which the question is based must be substantially correct to entitle the conclusion drawn by the expert to have any considerable weight.”

The reviewing court said of this instruction that it is erroneous as conveying the impression “that the opinion of the expert might have some weight even though the jury should find the facts assumed as a basis for the opinion were incorrect. * * * The sole value of the opinion must of necessity depend upon the correctness of the statement of facts upon which it is based. If that is incorrect, then the opinion can have no weight or value therefor.”

In the case of *The General Convention of the New Jerusalem Church et al v. Lucinda Crocker et al* heard before Judges Smith and Swing of the First Circuit, and Shauck of the Second Circuit (now of the Supreme Court), and reported in 7 C. C. R., 327, in the opinion by Judge Shauck it is pointed out that with respect to a material fact assumed in a hypothetical question where the evidence was conflicting, and the trial judge charged that:

“The value of that opinion is, therefore, increased or diminished in proportion as the supposed facts included in the hypothetical question tally with the facts proved in the case.”

Of this, Judge Shauck says:

“Logically, if any facts which the evidence does not establish are assumed as a part of the foundation of the expert opinion, the opinion is of no value for the purposes of the case. The theory upon which opinions of experts are admitted is, that the witnesses have knowledge not possessed by the jurors, which forms a foundation for safe conclusions in a particular case. As jurors are not supposed to have knowledge of the value of the several facts assumed as the basis of the opinion of the expert, they should not be set to speculating what his opinion would have been if any fact which the evidence fails to estab-

1904.]

Anglaize County,

lish had been omitted from the case. If it were otherwise, there would be no reason for the rule that a hypothetical question which assumes facts which the evidence does not tend to establish, is incompetent. The portion of the charge quoted refers to the facts assumed in the question put to the witness; while the expert's testimony affirmatively shows that many of those facts were not recognized by him as indicative of either sanity or insanity. The jury should have been instructed that if they were of the opinion that any fact assumed by the witness, as the basis of his opinion, was not established by the evidence, they should regard his opinion as of no value, unless his testimony shows that such fact affected only the confidence with which the opinion was held. While the instruction above quoted might have been intended to convey this meaning to the jury, it might have been understood by them as prescribing a law of mathematical proportion as the rule for ascertaining the value of the opinion, if all the facts were not established. There was nothing in the charge to prevent such misleading result."

We do not find the rule stated anywhere more clearly, nor the reasons therefor more forcible, than in the opinion by Judge Shauck from which the above quotation is made. And while with respect to the charge in the case at bar, it could not be fairly said that any law of mathematical proportion was prescribed as a rule for ascertaining the value of an opinion if all the facts were not established, yet the jury were at liberty to give weight to the opinion according to any law of proportion they might be pleased to adopt if all the facts were not established, or if certain of the facts assumed were shown to be incorrect, and therefore we regard what is said by Judge Shauck as pertinent in the case at bar.

When we come to read the law on the subject of testamentary capacity, and consider that one may have such capacity even though of extreme old age; even though enfeebled in body and mind by age and disease; even though the memory may be impaired in a degree, and the mind may be disturbed by hallucinations or delusions (not necessarily influencing the mind in making a testamentary disposition of property); even though the mind of the testator may not be sound in the sense of being whole, unbroken, unimpaired, unshattered by disease or otherwise, but it may suffer discomposure and derangement in con-

sequence of melancholy, grief, sorrow, misfortune, sickness or disease, yet, if such discomposure or derangement is not so great as to deprive the testator of the rational faculties common to men, he may still have testamentary capacity.

I say when we come to consider this in the light of the evidence in this case as to the physical and mental condition of the deceased, and the simple character of the will he signed, we feel bound to hold that the charge in the particulars pointed out contained serious errors prejudicial to the plaintiff in error and which may have produced a result different from that which might have been produced by a correct charge.

In this case because of the state of the evidence *pro* and *con* as to the testamentary capacity of the deceased, the evidence positive and negative, or, I may say, the paucity of evidence as to his loss of memory, lack of capacity to transact his ordinary business, delusions operating upon his mind so as to influence him in the disposition of his property; unnatural aversion to the natural objects of his bounty in view of their conduct toward and treatment of him; anything complicated or difficult in the problems to be considered and solved in the making of such disposition of his property as was attempted by the will in question, and other elements and subjects of inquiry ordinarily submitted to the jury as tests of testamentary capacity, and especially in view of the general character of the answers of physicians to the hypothetical questions mentioned, that in their opinions his mind was not, or might not have been sound, we think that the court should have given more prominence and emphasis to the phase of the law that sustains testamentary dispositions though the mind of the testator may not have been in all respects sound or the memory perfect, or the mind entirely clear or free from prejudice or even delusions (ideas not sufficiently elucidated in the charge); and the court should have avoided so charging as to in effect shift the burden of proof and impose it upon the defendant, a fault quite apparent in the charge.

Because of these errors the judgment of the court below is reversed and the verdict is set aside and the case will be re-

1904.]

Hamilton County.

manded to the court of common pleas, to be there proceeded with according to law.

Stueve & Connaughton, Jesse Stephens and Sumner & Tucker, for plaintiff in error.

Goeke & Hoskins, Layton & Son and D. F. Mooney, for defendant in error.

PLEADING—SPECIFIC PERFORMANCE.

[Circuit Court of Hamilton County.]

FRANK J. SCHNITZER v. ROBERT S. COLE.

Decided, March, 1904.

Pleading—Failure of Averment to Present an Issue—But Case is Tried as though Issue was Made—Assertion as to Purchase Received in Silence by Defendant—Not an Admission upon which Specific Performance can be Based.

1. Where a case is tried upon the theory that the pleadings present a certain issue, a reviewing court will consider it from that point of view, notwithstanding the failure of the averment relating to that issue.
2. The hearing in silence by the defendant in a saloon of a declaration by the plaintiff, that he had purchased a lot from defendant upon certain terms, is not sufficient to establish a claim for specific performance against positive testimony denying the existence of an agreement to sell, by defendant and his wife, the only persons present with plaintiff when the agreement is alleged to have been made.

GIFFEN, J.; SWING, J., and JELKE, J., concur.

The answer of the defendant to the amended petition contains no general or other denial of the agreement set up, and the averment that "said verbal agreement was an option upon said lot for two weeks from the said 12th day of May, 1903," is a mere conclusion of law, and presents no issue of fact. But inasmuch as the parties tried the case upon the theory that the pleadings presented an issue, whether the contract of sale was upon consideration that plaintiff pay the purchase money within two weeks from the date of the sale, we will so consider it.

At the time of the alleged sale the only persons present were the plaintiff, the defendant and his wife. The latter two both testify that the plaintiff first offered \$225; that the defendant asked \$275, and finally offered the lot to plaintiff for \$250 if he would pay the same within two weeks from that time, and that plaintiff accepted. The plaintiff testifies that the time of payment was two or three weeks from date of sale.

The testimony of the witness, Breitfelder, is a recital of a conversation between witness, plaintiff, and defendant, had in a saloon soon after the contract had been made and the receipt for five dollars given, in which plaintiff said that he had bought a lot of defendant and was to have two or three weeks to close up the trade, to which statement the defendant assented. It is not claimed by the plaintiff that the contract was made or its terms altered at this time, but only that the defendant admitted the terms of the contract to be as the plaintiff testifies they were originally understood by him.

Without intending to discredit the witness Breitfelder, we can only say that such an alleged admission, made under such circumstances, ought not to be considered as outweighing the positive statements of both the defendant and his wife of what took place at the time the contract was made. The receipt offered in evidence is in no sense a memorandum of the agreement, but only evidence of part payment in pursuance of that agreement. The parties elected to make a parol agreement, and the burden of proof being upon the plaintiff, we think he has failed to establish his claim for specific performance. It will be necessary however for the defendant to amend his answer in conformity with the proof made at the trial, when he will be entitled to a judgment.

Renner & Renner, for plaintiff.

H. E. Engelhardt, W. W. Bellew, for defendant.

1904.]

Cuyahoga County.

**A DIVORCE DECREE CAN NOT BE REOPENED AT A
SUBSEQUENT TERM.**

[Circuit Court of Cuyahoga County.]

WALTER B. SOLOMON v. ANNA A. SOLOMON.*

Decided, May 16, 1904.

Divorce—Publication for Defendant—Plaintiff a Non-resident—Decree Granted—Defendant Moves at a Subsequent Term—To Reopen the Case for Fraud—Section 5355 and Its Scope—Does not Reach the Question of Original Jurisdiction, and not Applicable to a Divorce Proceeding—Public Policy as to Divorce.

1. Section 5355, Revised Statutes, relating to the reopening of cases within five years in which there was no other service than by publication and the defendant had no actual notice of the pendency of the action, does not authorize the reopening of a divorce suit at a term subsequent to that in which the decree was entered.
2. Owing to the effect upon innocent parties which may result from the opening up of decrees for divorce, public policy requires that they be treated as a peculiar class in themselves to be governed by principles especially applicable to such cases.
3. Section 5355 would authorize the personal representative of a party who had died after judgment to have the judgment opened up in the same manner as the party if living might have done himself, and conversely that in a proper case a judgment might be opened up against the personal representative, for the purpose of being let in to defend. But in a divorce proceeding there is nothing to defend, for the case has abated and passed beyond the limits of revivor.

MARVIN, J.; HALE, J., and WINCH, J., concur.

Error to the court of common pleas.

The parties here are as they were in the court below.

Prior to the 13th day of April, 1901, the plaintiff and defendant were husband and wife. On said date the plaintiff filed his petition in the court of common pleas of this county, praying to be divorced from the defendant. Among the allegations of the petition was the following:

“The plaintiff says he has been a resident of the state of Ohio for the year last past, and is at present a *bona fide* resident of the said county of Cuyahoga.”

The defendant was a non-resident of the state of Ohio at the time the action was brought, and, on the 8th day of May, 1901, the plaintiff filed his affidavit with the clerk of said court,

*Reversing 1 N. P.—N. S., 113.

setting up that the defendant was not in the state of Ohio, and that her whereabouts were unknown to the plaintiff, and that service could not be made upon her other than by publication of notice to her. Thereupon notice was published to her of the filing and pendency of the petition, in a newspaper published and of general circulation in said Cuyahoga county, and such proceedings were thereafter had in the cause that on the 29th day of October, 1901, an order was made in said court, in these words:

"This cause having been duly advanced, came on to be heard October 29, 1901, upon the petition and evidence, the defendant being in default of answer or demurrer, although duly served with process according to law, and upon due consideration thereof the court finds that the allegations of the petition are true; that the plaintiff was a resident of the state of Ohio for one year next preceding the filing of his petition, and at that time was a *bona fide* resident of this county of Cuyahoga, and that the parties were duly married as stated in the petition. The court further finds that the defendant has been guilty of gross neglect of duty to said plaintiff as charged in the petition, and by reason thereof the plaintiff is entitled to a divorce as prayed for. It is therefore ordered, adjudged and decreed that the marriage contract heretofore existing between the parties hereto, to-wit, said Walter B. Solomon and Anna A. Solomon, be and the same is hereby dissolved and both parties are released therefrom."

At a subsequent term of said court, to-wit, on the 15th day of March, 1902, the defendant filed in said court a motion asking that the order and judgment heretofore quoted be opened and that she be let in to defend, and as cause for the granting of such motion it is stated therein:

"That she had no actual notice of the pendency of this case in time to appear in court and make a defense; that the plaintiff was not a resident of the state of Ohio during the year prior to the filing of the petition herein, and was not at the time of the filing of the petition a *bona fide* resident of Cuyahoga county, Ohio; that the allegations contained in the affidavit for publication herein, namely, 'that the said defendant's whereabouts is absolutely unknown to him' (meaning thereby the said plaintiff) was absolutely false and untrue."

With this motion the defendant filed an answer, which admits the marriage of the parties as stated in the petition, and denies each and every other allegation and averment in said petition contained. She also filed a large number of affidavits

tending to establish the averment in her said motion, that the plaintiff was not a resident of Ohio for the year next preceding the filing of his petition and that he was not a *bona fide* resident of the county of Cuyahoga at the time of the filing of such petition. The plaintiff was duly notified of the filing of the defendant's said motion, and, on the 17th day of April, 1903, the plaintiff filed his motion to strike from the files the motions and affidavits of the defendant, hereinbefore mentioned. This last motion was overruled by the court, and the motion of the defendant for the opening up of the original judgment and order was granted.

To the order of the court overruling the plaintiff's motion to strike the defendant's motion from the files exception was taken, as also to the order of the court opening up the original judgment in the case. If error was committed by the court in its ruling upon either of these motions, then whatever was done thereafter is without avail. We are brought, then, to a consideration of the question whether there was any authority in the court to hear and determine the motion made by the defendant.

On the part of the plaintiff it is urged that after the term of court at which the decree of divorce was entered the court was without authority of law, upon the defendant's motion to open up that decree. On the other hand, it is urged that such authority is vested in the court under Revised Statutes, Section 5355, which reads:

"A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order have the same opened and be let in to defend; but before the judgment or order can be opened, the applicant shall give notice to the adverse party of his intention to make the application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear, to the satisfaction of the court, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; and each party may present affidavits."

If this section of the statutes applies to actions for divorce, the motion of the plaintiff to strike off the defendant's motion was properly overruled. The learned judge by whom this motion was heard was of the opinion that the section applies as well to judgments for divorce as to other judgments, and, in

an opinion evidencing great care and careful consideration, he gives the reasons for so holding, premising such opinion by saying:

“The authorities are not at one upon the question whether a decree of divorce may be opened or reviewed after the term at which it was entered.”

All courts and text-writers have recognized that in cases of divorce questions of public policy of the gravest importance are involved, and hence courts have universally refused to interfere to set aside decrees of divorce once obtained without the clearest authority of law. Our own Supreme Court, in the well-known case of *Parish v. Parish*, 9 O. S., 535, uses this language in the syllabus:

“A decree from the bonds of matrimony, although obtained by fraud and false testimony, can not be set aside on an original bill filed at a subsequent term.”

In the opinion in this case, at page 538, Judge Peck calls attention to a provision of the statute then, but not now in force, reading:

“No appeal shall be obtained from the decree, but the same shall be final and conclusive.”

In commenting upon this, Judge Peck says:

“This statutory provision is nothing more than a legislative recognition of the principle of public policy, which had been repeatedly affirmed by the courts, that a judgment or decree which affects directly the status of married persons by sundering the matrimonial tie, and thereby enabling them to contract new matrimonial relations with other and innocent persons, should never be reopened. Such a course would endanger the peace and good order of society, and the happiness and well being of those who, innocently relying upon the *stability* of a decree of a court of competent jurisdiction, have formed a connection with the person who, wrongfully perhaps, procured its promulgation.”

As to this case, it is said that no question of jurisdiction such as arises in the case under consideration was involved. It does not appear from a report of the case whether either of the parties resided in Ohio at any time. It only appears that the plaintiff was not a resident of Brown county, in which county the decree was obtained. As we view the present case, however, we do not understand that the same question of jurisdiction was involved in that as is involved here, because the ques-

1904.]

Cuyahoga County.

tion here is, whether the court had jurisdiction, that is, authority of law, to hear and determine the rights of the parties under the motion filed by the defendant. If the court was without jurisdiction to hear that motion, then it should have been stricken from the files upon the motion of the plaintiff. As has already been said, if such jurisdiction existed, it existed by virtue of Section 5355, Revised Statutes. If that section applies, then the court was authorized by law to open up a decree and let in any defense which the defendant might have made upon the original trial. There is nothing in this section which authorizes the court upon such a motion to inquire into the jurisdiction in the original case rather than to inquire into the validity of any other defense. No question, whether jurisdictional or something else, could be inquired into by the court upon this motion without the court taking upon itself the determination of questions of fact. It would seem without doubt that the section of the statute under consideration would authorize the personal representative of a party who had died after the judgment to have the same opened up in the same manner as the party if living might himself have done, and conversely, that in a proper case a judgment might be opened up against the personal representative of one against whom such judgment had been granted. Clearly, in a divorce case this could not be done. A party is to be let in to defend. "Defend what?" as is said in the case of *Owens v. Sims*, *Ex'r*, 43 Tenn. Reports, 549. "Surely not a suit for divorce, for that had abated and passed beyond the limits of revivor." In this latter case the court had under consideration Section 4379 of the statutes of the state, which, after excepting certain cases, among which is not the action for divorce, this language is used:

"In all other cases, a decree against a defendant without personal service of process, who does not contest, is not absolute for three years from the decree, unless a copy of the decree is served upon the defendant; in which case it becomes absolute, if the defendant fails to come forward and make defense within six months after service."

As to this the court says, at page 548:

"It has no application to cases of divorce. * * * The legal consequence of such a construction of the statute will lead to results so anomalous and absurd, that it is clear the Legislature never intended it to be applied to divorce cases. They

rest, in our state, upon the peculiar provisions of the statutes enacted for their government; and the construction of this section of the Code contended for, is at war with the spirit, if not the letter, of the statutes of divorce in Tennessee.”

In the case of *Smith v. Smith*, 20 Mo. Reports, 166, the court holds that the statutes of Missouri authorize the setting aside of a decree of divorce in the same manner as other decrees in chancery might be set aside. The language of the statute under which this decision was held is this:

“That the circuit court, sitting as a court of chancery, shall have jurisdiction in all cases of divorce and alimony or maintenance, and the like process and proceedings shall be had in said causes as are had in other causes on the equity side of the court. The act regulating practice in chancery provides that, when a decree has been rendered in a chancery cause against a defendant who has not been summoned and has not appeared, such final decree may be set aside, if the defendant shall appear, and by bill of review, verified by affidavit, show cause for setting it aside as against equity.”

Taking these two provisions of the statutes of Missouri together—and a much stronger case for the setting aside of the decree is made than is made by the statutes of Ohio—and yet in this case a very vigorous dissenting opinion was handed down by Judge Scott, as found at page 169, *et seq.*, of the report.

In the case of *O'Connell v. O'Connell*, 10 Neb., 390, the court had under consideration Section 5674 of the statutes of that state, being Section 82 of the Code of Civil Procedure, which reads:

“A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition,” etc.

And, in commenting upon this section, this is said, on page 392:

“Do the provisions of Section 82 of the Code apply to actions for divorce? * * *

“It is very clear, from an examination of Section 82 of the Code, that the Legislature intended to limit its application to

1904.]

Cuyahoga County.

the cases mentioned in Section 77, and that it has no application to divorce suits."

The Section 77 referred to enumerates causes in which service may be made by publication, and does *not* include actions for divorce, but Section 2865 of the same statutes provides as follows:

"A petition or bill of divorce, alimony and maintenance may be exhibited by a wife in her own name, as well as a husband; and in all cases the respondent may answer such petition or bill without oath; and in all cases of divorce, alimony and maintenance, when personal service can not be had, service by publication may be made, as is provided by law in other civil cases under the Code of Civil Procedure."

From these sections it will be seen that the service by publication provided for in divorce cases is exactly that provided for in other cases, and that a literal construction of Section 82 would make it apply as well to divorce as to other cases. The authorities cited in support of the opinion of the court in this case are: *Lewis v. Lewis*, 15 Kan., 181; *McJunkin v. McJunkin*, 3 Ind., 30; *Gilruth v. Gilruth*, 20 Ia., 225; *Bingham v. Miller*, 17 Ohio, 445.

In all these cases, though the exact question here presented is not raised in all, the reasoning is to the effect that divorce cases constitute a peculiar class in themselves and are governed by principles especially applicable to such cases, a very weighty consideration being the effect upon innocent parties which may result from the opening up of decrees of divorce.

In the case of *McJunkin v. McJunkin*, *supra*, attention is called to the provision of the statute that the practice and proceedings in suits to obtain divorce shall be the same as the other cases in chancery, with certain specific exceptions. Attention is further called to the fact that under the statutes of the state it is provided that "Parties against whom a decree has been rendered without other notice than publication in a newspaper, may, at any time within five years, have such decree opened up and be let in to a hearing, by giving notice to the original complainant, or his heirs, devisees, executors or administrators," etc. This provision differs from the provision of our statute in that it in terms provides that the judgment may be opened up as against heirs, devisees, executors, etc.; but if what was said earlier in this opinion as to the rights of

personal representatives under our own statute is correct, then this statute in effect is what our statute is on the same subject.

In noticing the distinction to be made between divorce and other cases, the court, in this McJunkin case, calls attention to the fact that in divorce cases the defendant is not required to make a full answer, and that a general denial made in answer in a divorce case need not be verified by the oath of the defendant. This is equally true under our statutes; indeed, without any answer whatever under our statutes, the court is authorized to grant a divorce without full proof of the facts upon which the party obtaining it is entitled to obtain it, even though no objection is made.

The court, further, in the McJunkin case, uses this language:

“The rights of *bona fide* purchasers of property, sold under the decree sought to be opened, are protected by another section, but no provision is made that children born of a second marriage, before the opening of the decree, shall be legitimate; and upon the whole, taking all the provisions of both chapters and the consequences which would follow a different decision into consideration, we think the judgment of the circuit court should be affirmed” [which judgment was to deny the right to have the decree opened.]

By Section 5356 of our own statutes a like provision is made for the protection of those who have obtained property on the faith of a decree, and there is the same omission in our statute as to children born of a marriage contract on the faith of such decree.

The conclusion reached by us is that the court of common pleas erred in overruling the motion made by the plaintiff to strike the defendant's motion and affidavits from the files, and that by reason of such error all of the judgments and orders made by the court after overruling such motion of the plaintiff were erroneous. The judgment, therefore, overruling the plaintiff's said motion is reversed, and the judgments thereafter made in the case are reversed, and, proceeding to enter the judgment which the court of common pleas should have entered, the motion of the plaintiff to strike the defendant's motion and affidavits from the files is sustained.

E. B. Bauder, W. C. Rogers, for plaintiff in error.

Emil Joseph, for defendant in error.

1904.]

Darke County.

CROSSINGS OF INTERURBAN AND STEAM RAILWAYS.

[Circuit Court of Darke County.]

DAYTON & UNION RY. CO. v. DAYTON & MUNCIE TRACTION CO.*

Decided, November 23, 1903.

Bill of Exceptions—Final Judgment in Appropriation Proceedings—Res Judicata—Railway Crossings Statute Construed—Classification of Steam and Interurban Roads—Statutes Applicable to Each—Appropriation of Railway Property by Another Road—Appeal under Sections 3333-1 or 5226 from Application to Define Manner of Crossing Tracks—Eminent Domain.

1. Time for the taking of a bill of exceptions for the review of an order made at the preliminary hearing in an appropriation proceeding runs from the date of the order. But whether error can be prosecuted from an order made at the preliminary hearing—*Quære?*
2. A final judgment of the probate court in a proceeding brought by an interurban railway company to appropriate a right of way over the tracks and property of a steam railway company is *res judicata* as to all questions respecting the rights of both companies with reference to such crossing; and such questions can not be subsequently relitigated in the common pleas court to enjoin the use of the right of way, notwithstanding the suit in the common pleas was filed before the commencement of the proceedings in appropriation.
3. Under the statutes of Ohio steam railways and electric railways are not recognized as belonging to the same class, and statutes regulating and relating to the former are not applicable to the latter, unless an intention clearly appears to the contrary.
4. Hence, the common pleas court is without jurisdiction under Section 3333-1 to define the manner in which an interurban railway may cross a steam road.
5. No appeal lies from a judgment by the common pleas court dismissing an application made by a railroad company to define the manner in which another company may cross its right of way, notwithstanding the right of trial by jury does not exist and the judgment of dismissal is a final order.
6. The acquisition of property by a railroad company for railroad purposes is not a bar to the appropriation by another company possessing a like franchise of a right of way across said property.

*Affirming *Dayton & Union Ry. Co. v. Dayton & Muncie Traction Co.*, 1 N. P.—N. S., 218.

WILSON, J.; SULLIVAN, J., and SUMMERS, J., concur.

Three cases have been submitted to the court under the title of *The Dayton & Union Railroad Company v. Dayton & Muncie Traction Company*, 14 Dec., 17, 22, 143, numbered 489, 495 and 497. Nos. 489 and 495 are on appeal. No. 497 is a proceeding in error.

They arose in this way. On July 11, 1903, The Dayton & Union Railroad Company filed its petition in the court of common pleas to enjoin The Dayton & Muncie Traction Company from constructing a crossing at a designated point over its tracks, for the reason that to permit it to cross would be destructive to the rights and property of the plaintiff and would necessarily endanger the interests of the public as well as the property of the defendant; also that there was no necessity for the crossing at the point designated. A temporary restraining order was issued upon the filing of this petition and served upon the defendant.

On July 13, 1903, The Dayton & Muncie Traction Company filed its petition in the probate court under the statute seeking to appropriate the same crossing. Subsequently on August 15th, The Dayton & Union Railroad Company filed an application under Section 3333-1, Revised Statutes (95 O. L., 530), authorizing the court of common pleas, upon the application of a railroad, to prescribe the mode and manner in which one road may cross another. In the action in the probate court for the appropriation of the property, The Dayton & Union Railroad Company appeared and joined issue by filing an answer therein. The first defense in the answer is a general denial; the second is the pendency of the injunction case in the court of common pleas, relying upon it as ousting the jurisdiction of the probate court over the subject-matter of the suit. Subsequently on August 17, 1903, it filed a supplemental answer setting out the prosecution of the proceeding under the statute, 95 O. L., 530. A motion was made to strike this supplemental answer from the files in the probate court, and sustained.

The case in the probate court went to trial upon the issues joined and resulted in a finding and decree in favor of The

1904.]

Darke County.

Dayton & Muncie Traction Company, on August 10, 1903, that it had the right to prosecute the proceeding, that it was necessary for it to cross, and that it was not destructive of The Dayton & Union Railroad Company's franchise; and subsequently passing to the inquiry of damages, judgment was entered, fixing the compensation at \$75 and damages at \$25. Error was prosecuted from this judgment of the probate court to the court of common pleas and there affirmed; error is now prosecuted here to reverse the judgment of affirmance in the court of common pleas and the judgment of the probate court. This is the error case.

No. 489, which is the application to the common pleas court to fix and determine the mode and manner of crossing, resulted in that court in a decree in favor of the defendant and the dismissal of the application. The plaintiff gave notice of appeal, and seeks now to have the matter retried in this court. A motion is interposed here to dismiss the appeal.

An appeal is not specially provided for under this statute. If the right of appeal exists it must be under the general statute, Section 5226, Revised Statutes. In order that a party may be entitled to appeal under that section, three things must concur. The order from which appeal is sought to be prosecuted must be a final order; it must be made in a civil action in which the court has original jurisdiction; and the parties must not be entitled to a jury trial. The order in question here is a final order in the proceedings; the parties are not entitled to a jury trial; but it is not a civil action. So that the three things necessary do not concur and the party is not entitled to prosecute the appeal. The appeal, therefore, will be dismissed.

In the injunction case, being cause No. 495 in this court, The Dayton & Muncie Traction Company, the defendant in that action, filed an answer in which it pleaded the adjudication in the appropriation proceedings in the probate court. The Dayton & Union Railroad Company interposed a demurrer to this defense. The demurrer was overruled, and the plaintiff, not desiring to plead further, a decree was entered in favor of the defendant. The case on appeal is now submitted to this court upon the demurrer to this defense.

We are of the opinion that when The Dayton & Muncie Traction Company instituted the proceeding in the probate court to appropriate the property, The Dayton & Union Railroad Company, appearing and answering in that case, had then a plain and adequate remedy at law to which it was remitted; and when it litigated the questions necessarily involved in the appropriation proceedings to a final judgment in that court, it had adjudicated all of the questions which could arise in the injunction case in the court of common pleas. What was involved in both cases was the private right of the parties in, about, and over, this crossing. They each had a franchise right to use it as a crossing. The Dayton & Union Railroad Company had appropriated and paid for its private right, but it had no peremptory exclusive right that would prevent another road from appropriating a crossing on the same land under a like franchise from the state. What they had to contend about was upon what terms, if at all, could The Dayton & Union Railroad Company be deprived of its private property in that crossing by the power of eminent domain. The same subject-matter and the same questions would necessarily arise and be involved in the litigation in either one of the cases, except that the jurisdiction of the probate court was broader than the jurisdiction of the court of common pleas, in that it could give affirmative relief to The Dayton & Muncie Traction Company as well as to the Dayton & Union Railroad Company. The demurrer to the answer will be overruled.

The preliminary hearing in the condemnation proceeding was had in the probate court on August 10th; at least it resulted in the finding and order of the court on that date in favor of The Dayton & Muncie Traction Company upon all of the questions which were required by the statute to be determined as preliminary to the inquiry of damages. The Dayton & Union Railroad Company filed a bill of exceptions in the probate court on October 9th; that was ten days after the judgment on the inquiry of damages, but more than sixty days after the finding and order of the court upon the preliminary hearing. A motion was made in the court of common pleas to strike the bill of exceptions from the files. The motion was overruled by that

1904.]

Darke County.

court for the reason that the bill, when filed, was a good bill, at least, for the purpose of reviewing the judgment upon the inquiry of damages. A motion was also made to strike out of the bill that part which had reference to the trial on the preliminary questions which resulted in the judgment and order of August 10th. This motion was overruled, the court, in the consideration of the whole record, being of the opinion that the proper proceeding would be to ignore so much of the bill as was not authorized by law. It then found that for the purpose of reviewing the preliminary order made on August 10th, the bill of exceptions was not taken in time; that an appropriation proceeding is in effect two separate proceedings or actions; upon the preliminary hearing The Dayton & Muncie Traction Company is the plaintiff and had the burden of proof; upon the inquiry of damages The Dayton & Union Railroad Company stood in the attitude of plaintiff and had the right to open and close upon the question of damages; that when error is prosecuted from the probate court to the court of common pleas and results in a reversal of the judgment of the probate court, the action is set down for trial upon the inquiry of damages only, and not for a rehearing upon the preliminary questions. All of which being true, the court was of the opinion that in order to review the order made upon the preliminary hearing a bill of exceptions must be taken within the time prescribed by the statute from the date of that order, and this was not done.

This question is very obscure. We are not convinced that there is any right to prosecute error from the order made upon the preliminary hearing. It has been done, however, and has been passed upon by the Supreme Court without raising the question. If it can be done, then we are of the same opinion as the court of common pleas that the preliminary hearing is so far separate from the inquiry of damages, as that, in order to review, a bill of exceptions must be taken from the date of the order, and if not taken within the time prescribed by the statute the bill is not effective to bring the evidence on that question before the court. The common pleas court was right in re-

fusing to look to the bill for the purpose of determining whether or not the order upon the preliminary hearing was made upon sufficient evidence.

But the motion of The Dayton & Muncie Traction Company to strike from the files the answer of The Dayton & Union Railroad Company, pleading its proceeding under the statute to have the common pleas court fix the terms and conditions upon which one road could cross another, was sustained; this raises the question which was sought to be raised by the appeal in case No. 489. Because if The Dayton & Union Railroad Company was entitled under that statute to go into the court of common pleas and have that court fix the terms, modes and conditions upon which The Dayton & Muncie Traction Company could cross its road, and having done that, came into the probate court and pleaded the pendency of that proceeding, it ought to stay the hand of the probate court until the common pleas court had so fixed the mode and manner of crossing, for the reason that it would affect the question of compensation and damages.

We are called upon therefore to construe that statute; the question being whether or not it applies to The Dayton & Muncie Traction Company. The court of common pleas was of the opinion that it does not apply. We are of the same opinion, and might rest our conclusion in that respect upon the reasoning and the authorities found in the opinion of the learned judge of that court which had been filed with the papers in the case. But it is very easy to re-enforce that opinion by other authorities.

In *C., L. & A. Elec. St. Ry. Co. v. Lohe*, 68 Ohio St., 101, the Supreme Court has held:

“An interurban and electric railroad is classed as a street railroad by the statutes of this state.”

In the case of *Massillon Bridge Co. v. Iron Co.*, 59 Ohio St., 179, it is held:

“The statutes of this state relating to railroads are separate and distinct from those relating to street railroads, and the word ‘railroad’ in Section 3208, Revised Statutes, and in Sec-

1904.]

Darke County.

tion 1 of the act of March 20, 1889, 86 O. L., 120, Section 3231-1, Revised Statutes, does not include street railroads."

Turning to the last section referred to, Section 3231-1, Revised Statutes, we find it reads as follows: "Any person who shall have performed common or mechanical labor upon, or furnished supplies to any railroad, street railroad, or railroad operated wholly or in part by electric motor power," clearly implying that a railroad is one thing, a street railroad is another, and that a railroad operated wholly or in part by electric motor power may be another. They are not treated by the Legislature as synonymous terms. The statutes generally lead to this same conclusion. When one steam railroad crosses its trains over another steam railroad, if they have not the interlocking switch they must stop at a certain distance and not pass until they get the signal. When an electric railroad car passes over a steam railroad, it must send an employe forward to ascertain whether the track is clear, and the car can not cross until it is signaled by the employe that the road is clear.

On the same day that the special act under which this proceeding is sought to be prosecuted was passed, the Legislature passed another act conferring upon electric roads the power of eminent domain. The railroads had had that power from their inception, and if an electric road is identical that legislation would be superfluous. The Legislature clearly understood that they were different roads, and we are driven to the conclusion that the word "railroad" in this statute has a fixed legal signification. It means a steam commercial road and nothing else, and whenever it is used in a statute, that meaning must be given to it unless it clearly appears that some other meaning is intended. It does not appear in this statute that they had such other intention, nor does it appear from the proceedings upon the journals of the Legislature that it had any intention to give to the word any other than the ordinary legal signification.

We find that the direct question was decided by the Superior Court of Cincinnati in the case of *Rapid Ry Co. v. Railway Co.* The court says:

“We are of the opinion that House Bill No. 230, 95 O. L., 530, does not refer to the kind of road operated by the plaintiff.”

The road in question was an electric road. So that we hold the statute does not apply to The Dayton & Muncie Traction Company; that The Dayton & Union Railroad Company was not authorized by law to prosecute the proceeding which it did in the court of common pleas invoking the power of that court to fix the mode and manner of crossing, and that the answer setting up that proceeding in the probate court was properly stricken from the files.

We find no error upon the record. The judgment of the court of common pleas is affirmed.

Nevin & Nevin, J. C. Clark and C. B. Heiserman, for plaintiff in error.

Anderson, Bowman & Anderson and C. P. Matthews, for defendant in error.

1904.]

Cuyahoga County.

USURY.

[Circuit Court of Cuyahoga County.]

THE BROOKLYN BUILDING & LOAN ASSOCIATION COMPANY v.
DAMAS DESNOYERS AND ALPHONSINE DESNOYERS.

Decided, June, 1904.

*Building Associations—Usury—The Paragraph Relating thereto in
Section 3836 Constitutional—Corporation Laws.*

The third paragraph of Section 3836, Revised Statutes of Ohio, in so far as it exempts building and loan associations from the operation of the usury laws is not unconstitutional.

WINCH, J.; HALE, J., and MARVIN, J., concur.

This case was heard on appeal from the common pleas court. The petition prays for the foreclosure of a mortgage given to secure the payment of a loan made by plaintiff to defendant, Damas Desnoyers, certain covenants and agreements in said mortgage being as follows:

“The condition of this deed is such, That whereas the said Damas Desnoyers, being the owner of four and one-half shares of stock therein, has, together with Alphonsine Desnoyers, executed and delivered to the said The Brooklyn Building & Loan Association Company a certain written obligation of even date herewith for the sum of nine hundred dollars (\$900), being the amount received by him as a loan upon said shares under the terms and conditions prescribed in the constitution and by-laws of said company, and has therein specially agreed to pay to said company for such loan, without demand, on the second Wednesday of each and every month, beginning with the eighth day of May, 1895, until the said loan shall be finally paid, in the manner provided in said constitution and by-laws, the following sums of money, to-wit:

“1st. Dues: The sum of four and fifty one-hundredths dollars (\$4.50), being the monthly installment of dues on said shares.

“2d. Interest: The sum of four and fifty one-hundredths dollars (\$4.50), being the interest on said sum of nine hundred dollars (\$900), at six per cent. per annum, subject to annual

*This decision is in harmony with *Spies v. Loan & Trust Company*, 4 C. C.—N. S., 131; *Mykranz v. Globe Building & Loan Association*, 19 C. C., 51, not followed.

rebatement according to the provisions of the constitution and by-laws of said company.

"3d. Premiums: The sum of two and twenty-five one hundredths dollars (\$2.25) per month, being the premium on said loan at three per cent. per annum.

"4th. Fines: All fines, assessments and penalties which the said Damas Denoyers shall incur, or which may be levied upon him as a member of said company and in accordance with its constitution and by-laws.

"And it is further agreed that in case of default in making any of the payments stipulated for in the above obligation, when the same shall become due and payable, or to comply with the requirements of the constitution and by-laws of said company as aforesaid, then the amount secured by the within mortgage, with all arrearages, fines, premiums, or other charges thereon of whatever nature, shall become due and payable at once, or at any time thereafter, and whether there be subsequent defaults or not, all at the option of said company, and this mortgage may be foreclosed by due process of law."

An amended answer filed by the defendants alleges as a defense that prior to the bringing of this action plaintiff agreed to a settlement and liquidation of said loan upon the payment to it by the defendants of the balance due thereon computed as if the loan had originally been made to draw only six per cent. interest; that defendants had tendered to plaintiff the balance so computed and agreed upon, but plaintiff refused to accept it.

A reply denies that any agreement for settlement as alleged was ever made.

Upon the hearing no proof of any such settlement was made, but counsel for defendants contended that the contract sued on by plaintiff is usurious, and being usurious, that plaintiff is entitled to collect thereon only six per cent. interest, which defendants had tendered.

There is no question that the contract is an usurious one, but it must be enforced under the laws governing building and loan associations, unless said laws, so far as they authorize the collection of usurious interest, are invalid.

Thus the sole question for determination in this case is the constitutionality of the third paragraph of Section 3836 of the Revised Statutes, which reads as follows:

1904.]

Cuyahoga County.

"Such corporations (building and loan associations) shall have power to assess and collect from members and depositors such dues, fines, interest and premium on loans made, or other assessments as may be provided for in the constitution and by-laws. Such dues, fines, premiums or other assessments shall not be deemed usury, although in excess of the legal rate of interest."

It appears that the Circuit Court of the Fifth Circuit, sitting in Ashland county, in the case of *Mykrantz v. Globe Building & Loan Association*, 19 C. C., 51, held that the Legislature, by exempting building and loan associations from the operation of the usury laws, had undertaken to grant "special privileges to a certain class of people and to a certain class of corporations" in contravention of Sections 1 and 2 of the Bill of Rights, and that therefore said exemption is invalid.

The Circuit Court of the Sixth Circuit, sitting in Lucas county, in the case of *Spies v. Loan & Trust Company*, 4 C. C.—N. S., 131, held that the law is not a violation of said Sections 1 and 2 of the Bill of Rights.

There is no decision of the Supreme Court directly in point, but the right of building and loan associations to collect usurious interest has been recognized and enforced by the Supreme Court repeatedly.

The first building and loan association act in this state was passed May 5, 1868 (65 O. L., 127), and amended three days later (65 O. L., 173). The original act as amended provided as follows:

"Section 2. Such corporation shall be authorized and empowered to levy, assess and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced and premiums bid by members or depositors for the right of precedence in taking loans, as the corporation by its by-laws shall adopt; also, to acquire, hold, encumber and convey all such real estate and personal property as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in the due course of its business; *provided*, that the dues, fines, and premiums so paid by members or depositors, although paid in addition to the legal rate of interest on loans taken by them, shall not be construed to make the loans so taken usurious; *and provided also*, that no person shall hold more than twenty shares in any such association, in his own right."

While this act was in force the case of *Lucas v. The Greenville Building & Savings Association*, 22 O. S., 339, was heard by the Supreme Court.

"This was an action by the association to recover of Lucas money which he had as a loan from it as a member of the company. Interest was reserved and paid upon this loan exceeding eight per cent. per annum, the maximum rate allowed by the general law, but not exceeding the limits allowed by the statute under which the company was organized. This matter of alleged usury was set up as a defense, to the extent of the excess of interest paid over six per cent."

The court held:

"The interest reserved was no more than the law allowed."

In the case of *Ohio, ex rel, v. Greenville Building, etc., Association*, 29 O. S., 92, the court recognized the right of the association to charge a premium in addition to the legal rate of interest, but held that "the only mode by which the premium on a loan can be fixed is by the bidding of the members or depositors for the right of precedence."

In the case of *Licking Co. S. L. & B. Association v. Bebout's Admr.*, 29 O. S., 254, it appears that one Bebout had received from the association the sum of \$410, bidding \$390 premium for precedence in taking the loan and had given the association a mortgage to secure the payment to it of the full sum of \$800. He made payment of monthly installments of dues and interest for some time and then died. His administrator elected to return the \$410, and tendered the amount, less amounts previously paid in dues and interest, but the association refused to accept it. Thereupon the administrator commenced suit to cancel the mortgage, the common pleas court ruled in his favor and the district court did the same. Judge Gilmore, in deciding the case, said: "If the loan in this case consisted of the cash received on taking it, which was \$410, exclusive of the premium bid for precedence, which was \$390, the decree of the district court was correct, and must be affirmed. If, on the other hand, the loan consisted of the aggregate of these sums, i. e., \$800, the decree was erroneous and must be reversed." The decree was reversed.

In the case of *Bates v. People's Savings & Loan Co.*, 42 O. S., 655, the court defined the premium which should not be con-

strued to make the loan usurious as one bid by a member or depositor for the right of precedence in taking a loan, at a competitive sale of such right. This case was decided in 1885, and the following year the law was amended by leaving out the requirement that the premium must be bid, leaving it to the association to provide in its constitution and by-laws regarding the payment of premiums (83 O. L., 116). Again, in 1891, the law was amended and the provision now known as Section 3833-3 and heretofore quoted, was adopted (88 O. L., 462). In the present law such associations are authorized to charge such dues, fines, interest and *premiums* on loans made or other assessments, as may be provided for in the constitution and by-laws. Since the passage of this act, the powers of such corporations and the rights and liabilities of their members thereunder, have been reviewed by the Supreme Court, and the following quotations are from an opinion by Chief-Justice Minshall in the case of *Eversmann, Receiver, v. Schmitt*, 53 O. S., 174, decided in 1895:

“Mutuality is the essential principle of a building association. Its business is confined to its own members; its object being to raise a fund to be loaned among themselves, or such as may desire to avail themselves of the privilege. This is done by the payment, at stated times, of small sums, in the way of dues, interest on loans and premiums for loans. Each shareholder, whether a borrower or non-borrower, participates alike in the earnings of the association, and alike assists in bearing the burthen of losses sustained.

“The borrower before his stock is paid up, receives from the association the par value of his shares, in the nature of an advance loan. For this, he agrees to pay the premium, if any, for the privilege, the interest on the money advanced, subject to abatements to be made at stated times, and the dues on his stock until it matures. In other words, he agrees to keep up and pay out his stock, as if he were a non-borrower, in consideration of the amount being advanced to him before that time. Hence, the borrower remains a stockholder, and participates in all the privileges and benefits of a stockholder; has a voice in the management of the association and participates in its earnings. The latter go toward discharging his obligations arising on the loan, and to shorten the time in which he will be fully discharged therefrom. For, taking all losses into account, whenever the shares of the borrower have reached their par value by the pay-

ment of dues and the apportionment of earnings, the loan is liquidated and he ceases to be a member, as he would, if he had not borrowed at all. In other words, with his shares paid up, he discharges his obligations as a borrower. And the exact test of his right to call for a cancellation of the mortgage given to secure his obligations as a borrower, is the inquiry whether he would have been entitled to receive from the association the par value of the shares on which the loan was made had he not become a borrower.

"In this case Mrs. Schmitt subscribed for twelve shares, and received from the association their par value, \$3,000, as an advanced loan, at a premium of \$240. She paid the premium, and agreed to pay the dues thereon, \$6 per week, and interest at the rate of six per cent., subject to the annual abatement, 'until such time as the weekly dues paid and dividends declared and unpaid shall amount to the sum of three thousand dollars,' and all 'assessments' that might be levied upon her as a member of the association. * * *

"It is wholly unlike a savings society where the borrower is not a member or otherwise interested in its business. Having no voice in the management, nor interest in the earnings of the society, the borrower and it sustain the simple relation of debtor and creditor. Here, as shown, the borrower is also interested as a creditor. The loan is for no definite period of time. It depends upon the management of the association, in which he continues as a member and has a voice." * * *

In that case, the court held the defendant to the payment not only of dues, interest and premiums on her loan, but required her to pay in addition thereto an assessment of nearly \$1,000 made by a receiver of the association after its insolvency, as her share of the losses of the association.

From the foregoing authorities it appears that the very question here involved, to-wit, the constitutionality of the law authorizing building and loan associations to charge premiums in addition to the legal rate of interest, has been many times incidentally, if not directly, before the Supreme Court, and yet the law has stood upon the statute books of this state and been enforced for more than thirty-six years. Indeed, some of the reported cases were in the nature of *quo warranto* cases in which the associations pleaded the statute as their warrant for charging premiums, and the Supreme Court refused to oust them from such franchise, though it saw fit to regulate them in its exercise to conform to the strict letter of the law.

Believing the decisions of this state recognize the validity of the law, we have deemed it unnecessary to consider the many authorities cited to us from other states in which the constitutionality of similar statutes has been sustained.

It may be remarked that our usury laws are statutory. Their application may be extended or limited at the pleasure of the Legislature. In recent years many of the states have repealed all laws regulating the rate of interest which may be contracted for.

In the *Mykrantz* case, the able judge delivering the opinion concedes that the statute here in question does not violate Section 26, Article II of the Constitution, which requires that all laws of a general nature shall be uniform in operation throughout the state, nor Article XIII, which prohibits special acts granting corporate powers. He says:

“This law, whatever else may be said about it, is a law of a general nature and is uniform throughout the state. It applies to all building and loan associations in whatever corner of the state they may be found. It is not granting, as we view it, a special or corporate power by special act of Legislature.” 19 C. C., 56.

But he says it “gives special privileges to a certain class of people and to a certain class of corporations.” That is true of all corporation laws—they grant special privileges to classes of corporations by which the classes of people who are members thereof benefit.

Railroad corporations enjoy the right to condemn private property; this is a special privilege enjoyed by no individual; and so the special privileges enjoyed by corporations and their stockholders might be enumerated at great length. We are not in harmony with the conclusion reached in the *Mykrantz* case, and therefore affirm the constitutionality of the law.

Decree for plaintiff.

Smith & Taft, for plaintiff.

Thos. Robison, for defendants.

WIDOW'S EXEMPTION.

[Circuit Court of Hamilton County.]

PENNY BROWN v. WILLIAM H. PARHAM.

Decided, December 16, 1903.

Exemption—Homestead—Right of a Widow Thereto the Same as of an Unmarried Female—Punctuation of Section 5441.

A widow not the owner of a homestead is not entitled to hold exempt from levy and sale in lieu thereof \$500 worth of real or personal property, unless she has in good faith the care and maintenance of a minor child or children of a deceased relative.

GIFEN, J.; JELKE, J., and SWING, J., concur.

Error to court of common pleas.

The plaintiff in error being a widow, not the owner of a homestead, and not having in good faith the care, maintenance and custody of any minor child or children of a deceased relative, is not entitled to hold property exempt from levy and sale, unless under Section 5441, Revised Statutes, but in this section, as now punctuated, the words "having in good faith the care, maintenance and custody of any minor child or children of a deceased relative" qualify the word "widow" as well as the words "unmarried female," and a widow not having the care of such child can not hold property exempt under this section. When the case of *Wentzel v. Hayes*, 16 C. C., 110, was decided, Section 5441, Revised Statutes, as amended in 81 O. L., 148, contained no comma after the words "unmarried female" as it now does, and as found in Whittaker's code it contained a comma after the word "widow." This punctuation evidently influenced the court in that decision, as there is no sound reason why a widow should be entitled to an exemption that an unmarried female is not entitled to.

The judgment will be affirmed.

E. H. Williams, for plaintiff in error.*A. J. Cunningham* and *W. H. Parham*, for defendant in error.

1904.]

Fairfield County.

PROVISION FOR DEPOSIT OF PUBLIC FUNDS.

[Circuit Court of Fairfield County.]

THE STATE OF OHIO, EX REL THE CITY OF LANCASTER, OHIO, BY
AUGUSTUS W. MITHOFF, SOLICITOR OF THE CITY OF
LANCASTER, OHIO, v. FRANK E. BOWERS, TREAS-
URER OF THE CITY OF LANCASTER, OHIO.

Decided, September Term, 1903.

Mandamus—City Treasurer—Depositary of Public Funds—Sections 135 and 136 of the Municipal Code of 1902—City Solicitor May Commence Proceedings under Section 1777 and Section 137 of the Municipal Code—Municipality Would not Have Adequate Remedy at Law, when—Section 135 of Municipal Code Constitutional—Ordinance Passed at Special Meeting of Council Valid—Effect of Failure to Notify Member of Special Meeting—Treasurer has no Discretion under Section 135 and 136—Sufficiency of Bond of Depositary of Public Funds.

1. Under Section 1777 Revised Statutes of Ohio, as amended April 1, 1890 (87 O. L., 122), and Section 137 of the act of October 22, 1902 (96 O. L., 65), known as the Municipal Code, no action of the council of a municipality is necessary or required to empower or authorize the solicitor thereof to commence proceedings in mandamus to compel an officer or board of the municipality to perform any duty expressly enjoined by law or ordinance, when such officer or board refuses to perform such duty.
2. A municipality would not have an adequate remedy at law if the treasurer thereof disobeyed its valid ordinance, and refuses to deposit the public funds in his hands as such treasurer in a depositary lawfully selected by its council, under Section 135 of said act of October 22, 1902.
3. Section 135 of said act of October 22, 1902, providing that council shall have authority to provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer in such bank or banks situated within the city which may offer, at competitive bidding, the highest rate of interest, etc., is constitutional and valid.
4. An ordinance selecting such depositary passed at a special meeting of the council when one member of the council was absent and

*Affirmed by Supreme Court without report, February 16, 1904. Spear, C. J., Davis, Shauck, Price and Crew, JJ., concur. OHIO LAW REPORTER, February 22, 1904, p. 883.

had not been notified of the meeting is not for that reason invalid or void.

5. The treasurer of a municipality has no discretion as to whether he will or will not obey an ordinance legally passed by council, providing for a depositary for all public funds, including school funds, coming into his hands as such treasurer, under Sections 135 and 136 of the act of October 22, 1902, and upon his refusal to obey such ordinance mandamus will lie to compel him to do so.
6. When it appears at the time an ordinance was passed by a municipality selecting a depositary, under said Section 135, a bond was given in double the amount of the funds then in the treasurer's hands, including school funds, and, afterwards, additional funds come into his hands, the depositary, with the approval of the council, may give an additional bond to cover the increase, so as to keep the security double the amount to be deposited.

In mandamus.

This is an action or proceeding in mandamus to compel the city treasurer of the city of Lancaster, Ohio, to deposit the public moneys of which he has charge in a bank selected as depositary pursuant to an ordinance of the city council, under Section 135 and 136 of the Municipal Code (96 O. L., 64, 65.)

The plaintiff filed in this court August 29, 1903, the following petition: (Omitting caption, signatures and verification.)

"The relator, August W. Mithoff, says that he is and for several years last past has been the duly elected, qualified and acting solicitor of the city of Lancaster, Ohio, and a tax-payer, resident and citizen thereof, and he files this petition as relator as such solicitor and on behalf of said city.

"That the city of Lancaster is a municipal corporation situated in Fairfield county, Ohio, classed as a city under the laws of Ohio.

"That defendant, Frank E. Bowers, is and since April 13, 1903, has been the duly elected, qualified and acting treasurer of said city of Lancaster, Ohio.

"That on June 29, 1903, the city council of said city duly enacted an ordinance, entitled, 'An ordinance No. 10 providing for the deposit of all public moneys coming into the hands of the treasurer of the city in such bank or banks, situated within the city, which may offer at competitive bidding the highest rate of interest therefor and give bond as required by law,' which said ordinance was duly approved, signed and returned by the mayor of said city, on June 30, 1903, and was thereupon published in two newspapers of opposite politics printed, pub-

1904.]

Fairfield County.

lished and of general circulation in said city, for two consecutive weeks, all as required by statute.

"In and by said ordinance it was provided by said city council that all public moneys coming into the hands of the treasurer of said city should be deposited in such bank, situated within said city, as might offer at competitive bidding the highest rate of interest therefor and give sufficient bond therefor of some approved guaranty company in a sum at least double the amount to be deposited; and in and by said ordinance it was provided that the clerk of said council should publish in two newspapers printed and of general circulation in said city once a week for four consecutive weeks a notice inviting sealed proposals from all banks situated within said city, stipulating the rate of interest that shall be paid for the use of the money aforesaid for the period of two years, and that on the day named in said notice the clerk of council should in the presence of the finance committee of the council and the mayor, open said proposals and transmit the same to the city council at its next meeting thereafter, and the council should award the same to the bank offering the highest rate of interest therefor and giving bond as required by law, and that such bank should thereupon become the depository of the public moneys of said city for the period of two years next thereafter ensuing.

"It was also provided by said ordinance that the treasurer upon receipt of a written notice signed by the president and clerk of council stating that a depository had been selected and the name of such bank so selected should deposit in such bank all public moneys in his custody subject to said terms and conditions aforesaid.

"And that pursuant to said ordinance the clerk of council duly published in the *Lancaster Gazette* and *Ohio Eagle*, two newspapers printed, published and of general circulation in said city and of opposite politics, once a week for four consecutive weeks, a notice inviting sealed proposals from said banks as aforesaid, stipulating the rate of interest they offered to pay for such deposit, and named August 13, 1903, at 12 o'clock noon, as the time for opening such bids; and pursuant to said notice and ordinance, the Hocking Valley National Bank of Lancaster, Ohio, duly filed its sealed bid with said clerk of council and therein offered to pay the sum of two and fifty-five one-hundredths per cent. per annum interest upon daily balances, for the use of said moneys for the period of two years as aforesaid, and on August 13, 1903, after 12 o'clock noon, the clerk of council in presence of the finance committee of the council and mayor opened all bids and publicly read the

same and transmitted the same to the city council at its next meeting, and said bid of said the Hocking Valley National Bank of Lancaster, Ohio, offered the highest rate of interest and was the highest and best bid therefor; and at their said meeting the city council duly received said bid and approved and accepted the same and ordered said bank to file its depositary bond as required by law and said ordinance; and on August 20, 1903, said bank duly filed with said council a good and sufficient bond as its depositary bond as aforesaid, being in the sum of one hundred thousand dollars, which was double the amount to be deposited, conditioned that it would receive and safely keep said public moneys and pay the same upon the lawful orders and vouchers of said city and its authorized officers, which said bond was duly executed by said bank and the United States Fidelity & Guaranty Company, of Baltimore, Md., as its surety; and said the United States Fidelity & Guaranty Company, of Baltimore, Md., was and is an approved guaranty company duly authorized by law to do business in this state, and on August 20, 1903, the city council duly accepted said bond and approved the same and named said the Hocking Valley National Bank of Lancaster, Ohio, as the depositary of the public moneys aforesaid, and on August 27, 1903, the defendant was personally served with a written notice signed by the president and clerk of the council stating that said bank had been selected as said depositary for all public moneys coming into his possession as such treasurer.

“And that said the Hocking Valley National Bank of Lancaster, Ohio, was, and is a national bank under the statutes of the United States of America, doing a banking business and situated within the city of Lancaster, Ohio, and is ready and able to receive said public moneys as aforesaid.

“And all said proceedings in connection with such competitive bidding and deposit of such moneys were conducted in such manner as to insure full publicity and were open at all times to the inspection of any citizen.

“And that on said August 27, 1903, and continuously since, the defendant has had in his custody as treasurer of said city a large sum of money, viz., the sum of \$45,000 public moneys in his hands.

“And that on August 27, 1903, it became and was the official duty of defendant, as treasurer as aforesaid, to deposit said public moneys in said depositary, the Hocking Valley National Bank of Lancaster, Ohio, as shown by the premises, but said treasurer has without cause failed and refused so to do, and has not deposited said funds or any part thereof in said depositary, but yet refuses so to do.

1904.]

Fairfield County.

“That the relator has no complete or adequate remedy at law in the premises to enforce the provisions of said ordinance.

“Wherefore, relator prays that a writ of mandamus issue commanding defendant as treasurer as aforesaid to forthwith deposit said public moneys aforesaid in said the Hocking Valley National Bank of Lancaster, Ohio, being said depository, and for all other proper relief.”

At the September Term, to-wit, September 1, 1903, of this court for said county, it was ordered that an alternative writ of mandamus issue to the defendant, Frank E. Bowers, treasurer of the city of Lancaster, Ohio, commanding him that he forthwith deposit all public moneys now in his hands, or hereafter coming into his hands, as treasurer of the city of Lancaster, Ohio, in and with the Hocking Valley National Bank of Lancaster, Ohio, as the designated depository thereof, as provided by ordinance of said city, as set out in the petition, or else that he, the said respondent, answer or otherwise plead to said petition by the 15th day of October, 1903, and show cause why he has not done or should not do said act, and the clerk shall forthwith issue such writ and attach thereto a true copy of the petition that the same may be served upon the defendant by the sheriff.

By agreement of both parties this cause was assigned for trial upon October 21, 1903, and said term of this court was ordered to remain open and unadjourned for such purpose.

September 5, 1903, the alternative writ was issued pursuant to said order, which came into the hands of the sheriff of said county September 8, 1903, and on the same day the writ was served upon the defendant, Frank E. Bowers, Treasurer of the City of Lancaster, Ohio, personally, by delivering to him a duly certified copy of the writ including the petition, verification and order.

On the 15th day of October, 1903, the defendant filed his answer, which is as follows: (Omitting caption, signatures and verification.)

“And now come the defendant, and for answer to the alternative mandamus, says: That plaintiff ought not to have its said writ of peremptory mandamus because he saith:

"First Defense. The city council of said city did not by any resolution or ordinance, or in any other manner, ever direct or authorize the institution or prosecution of said proceeding in mandamus or any other action against said defendant; and the said proceeding was begun and carried on by the said city solicitor of his own volition and without any lawful authority whatsoever.

"Second Defense. The statute under which the city council of said city—being Section 135 of the act of the General Assembly passed October 22, 1902—professed to exercise the power of creating a depositary of said public moneys by said alleged ordinance is unconstitutional, null and void.

"Third Defense. The defendant denies that the said alleged ordinance No. 10 of date June 29, 1903, providing for the deposit of said public moneys was duly enacted, as is averred in the petition.

"He also denies that the said city council ever duly accepted the bid of the said the Hocking Valley National Bank as such depositary, and he avers that the action of the council professing to accept said bond of said Hocking Valley National Bank was illegal and void, because the same was not had at any regular or adjourned meeting of that body, but at a so-called special meeting on August 20, 1903, notice of which was not given to all the members of the council, served personally, or left at their usual place of abode, and all of them were not present at such special meeting and did not participate in such proceedings.

"And the bond of said bank as such depositary was therefore never accepted by the said council, nor any contract ever made or entered into between said bank and council for the deposit of said public moneys.

"Fourth Defense. The defendant is not only treasurer of said city, but also ex-officio treasurer of the school funds of said city, which is the city school district of the second class and includes a large territory outside of the corporate limits of said city, attached thereto for school purposes, and the school funds of said district in the custody and possession of the defendant as such treasurer, are made up largely of taxes collected for school purposes from persons and property not residing or lying within the boundaries of said city.

"In and by the terms and provisions of said alleged ordinance the defendant is required to deposit in said bank not only the public moneys of and belonging to said city, but also the school funds of said school district, and said alleged ordinance and the proceedings of said city council in respect thereto are

all illegal and void for the reason that the said school funds are so included therein.

“The defendant has in his possession about \$45,000 of the moneys of said city, and also about \$18,000 of the money of and belonging to said school district, and the bonds of said school district have been issued and sold for the sum of \$75,000 additional, which is now ready to be turned over to the defendant, as treasurer of said district, while the bond made and delivered by said bank as such depository to said city is in the penal sum of \$100,000 only, and no bond was ever given by said depository to the board of education. The written notice served upon the defendant, signed by the clerk and president of the council, as set out in the petition, directed and required him to deposit in said bank, not only the city moneys, but the funds of said school district as well. The defendant has given bond, as required by law, to the said city, which has been duly approved and accepted as treasurer of said city, and also a bond to the board of education of said school district as treasurer of the school funds of said district to the acceptance and approval of said board of education, as required by law.

“For the reasons aforesaid set out in his several defenses and exercising the discretion and due care confided in and imposed upon him by law, the defendant refuses to deposit said city and school moneys or either thereof in said bank.

“Wherefore, the defendant prays the said petition of the relator and alternative mandamus issued in this case be dismissed at its costs, and for all proper relief.”

To this answer the plaintiff on October 20th, 1903, filed the following reply: (Omitting caption, signature and verification.)

“Replying to the several defenses of the answer, plaintiff says: As to the third defense. At the special meeting of the city council of August 20, 1903, six of the seven members had been duly notified and were present and voted to approve said bond; the seventh member was continuously absent from the city for a number of days preceding said call and until after said meeting was held and his place of abode was closed, and service of said notice could not be made upon him within said city. And the said action of the city council at said special meeting was ratified at the next regular meeting thereof.

“As to the fourth defense: (1) The limit of the city of Lancaster and the Lancaster School District are identical. (2) Since the giving of said bond and since the commencement

of this case, the defendant has received large sums of public moneys as treasurer, so that he has now in his possession \$63,000; and the original bond of \$100,000 is no longer double the amount of such funds; and on October 19, 1903, said depository, the Hocking Valley National Bank of Lancaster, Ohio, duly filed with said city council an additional bond duly conditioned for the securing of said deposits in the further sum of \$100,000, being a good and sufficient bond with an approved guaranty company as surety; and said bond was duly accepted and approved by said city council on October 19, 1903. And said bonds are more than twice the sum of public moneys now in the hands of said treasurer, to be deposited."

On the same day, to-wit, October 20, 1903, the defendant filed his motion to strike out the second sub-division of the reply to the fourth defense on the grounds that the facts therein alleged are immaterial and irrelevant.

The cause was submitted to the court upon the pleadings, evidence and agreed statement of facts.

VOORHEES, J.; DONAHUE, J., and McCARTY, J., concur.

The questions presented in this case are questions of law rather than of fact, and may be summarized as follows:

1. Can the city solicitor institute this proceeding as relator upon his own volition and without direction by resolution or otherwise from the city council?

2. Is there an adequate remedy at law?

3. Is Section 135 of the Municipal Code a constitutional enactment?

4. Is this depository ordinance valid and lawful?

5. Has the city treasurer discretion as to whether he will or will not obey the ordinance passed by the city council under Sections 135 and 136 of the Municipal Code?

6. Can the school funds be controlled by the city council as to selecting the depository?

7. Are the bonds of the depository sufficient?

1. Considering these questions in their order attention will be directed to the legal capacity of the city solicitor to bring and maintain this action.

Section 1777, Revised Statutes, provides:

1904.]

Fairfield County.

“He (city solicitor) shall apply, in the name of the corporation, to a court of competent jurisdiction for an order or injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinances governing the same, or which was procured by fraud or corruption. And he shall likewise, whenever an obligation or contract made on behalf of the corporation granting a right or easement or creating a public duty is being evaded or violated, apply for the forfeiture or the specific performance of the same as the nature of the case may require. And in case any officer or board fails to perform any duty expressly enjoined by law or ordinance, he shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.”

Section 137 of the act of the General Assembly, of October 22, 1902, known as the Municipal Code, provides that “the powers and duties of the solicitor shall be such as are provided in Sections 1776, 1777, 1778, 1779 and 1780 of the Revised Statutes of Ohio; such as are provided in this act, and all other acts or parts of acts having uniform operation throughout the state and not inconsistent with this act,” etc. This section of the Municipal Code leaves in force Section 1777 of the Revised Statutes, under which no action of the council is required for his authority to take legal steps to enforce the specific performance of a contract made by the corporation as the nature of the case may require.

This action we think falls within the meaning and language of this statute. The defendant as treasurer of the corporation refused and still refuses to perform an official act in relation to the contract made by the corporation through its council in pursuance of an ordinance passed by that body. The contention of the defendant is that because the name of the city appears in the caption the authority of the city council therefore must be had. The statute expressly provides how the solicitor shall apply for these extraordinary remedies, namely, in the name of the corporation. If it were unnecessary for the solicitor to bring the suit in the name of the city, then it would be very clear that authority from the city council would not

be a condition precedent to bringing the action, and in naming the city would be mere surplusage. On the other hand if the action is to be prosecuted in the name of the corporation the authority to bring such an action is expressly given by the statute, Section 1777, above referred to.

This section (1777) is a remedial statute and is to receive a liberal construction. Its object and meaning is to preserve to the municipal corporation its rights. It is not to protect any right peculiar to a tax-payer, but to protect a right that belongs to the city; and if it is a right for the corporation to select a depository for the public funds of the corporation, and it has taken legal steps to select such depository and made a contract therefor, and that contract is not complied with by any party who is liable to be so controlled, in such case the solicitor, in the name of the corporation, may bring such legal proceedings as are necessary for the specific performance of the contract. In other words, in any case where any officer or board fails to perform any duty expressly enjoined by law or ordinance, the solicitor shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty. Section 1777, Revised Statutes; *Johnson v. Farley, Mayor*, 8 Nisi Prius, 498.

The subject matter of this action and what is sought thereby is to require the treasurer of the city of Lancaster to perform a duty required by an ordinance duly passed by the city council under Section 135 of the Municipal Code, and the purpose of Section 1777, Revised Statutes, is to provide means to secure to the municipal corporation its rights under said ordinance. We think this construction is consonant with the principles recognized in *Elyria Gas Company v. City*, 57 O. S., 374, 383; *The State v. Voyce*, 43 O. S., 52; *Knorr v. Miller*, 5 Cir. Ct. (Ohio), 614; *Gas Light Company v. Zanesville*, 47 O. S., 50.

Our conclusion, therefore, is that this proceeding is properly commenced by the city solicitor in the name and on behalf of the corporation, and it was not necessary for the council of the corporation to expressly authorize the proceeding by ordinance or otherwise.

1904.]

Fairfield County.

2. It is contended by the relator that the defendant should not maintain this proceeding as the city or municipal corporation would have an adequate remedy at law upon the bond of the treasurer; that his refusing to obey the direction of the city council to deposit these funds in a depository selected by such council is not ground for mandamus, and that a suit for damages would afford an adequate remedy; and that the plaintiff, therefore, is not entitled to the writ of mandamus for the reason that there is a plain and adequate remedy for the grievance complained of in the ordinary course of the law.

An action upon the treasurer's bond or the impeachment or removal of the officer may not, and in fact are not always adequate remedies for failure to discharge an official duty; and it would not be, in our judgment, in this case, for the reason that if the council have a right to select the place of deposit of the public funds and to make a contract for the same at competitive bidding and thereby secure not only an income from the funds but additional security for their safe keeping, these advantages could not be secured in a suit for damages upon the treasurer's bond or by proceedings in impeachment of the officer. We think the principle is recognized in *The State v. Staley*, 38 O. S., 259, 264; *The State v. Hoglan*, 64 O. S., 532; *Elyria v. Railroad Co.*, 9 Nisi Prius, 609; 12 Dec., 609.

It is quite manifest from the pleadings and contention of counsel in this case that the refusal of the treasurer to turn the funds into the depository selected by the city council was by reason of the different construction placed upon Section 135 of the Municipal Code, about which there may be an honest difference of opinion. In such case this would not be such evidence of incompetency or misconduct in the officer as to warrant his removal on these grounds. The proper remedy in such case is a proceeding in mandamus to compel him to act in accordance with the proper construction of the statute, or show cause why he does not. *State, ex rel Attorney-General, v. Hoglan*, 64 O. S., 532.

3. As to the constitutionality of Section 135 of the Municipal Code it is contended by counsel that this section is unconstitu-

tional because it is in violation of Section 6, Article VIII of the Constitution of the state of Ohio, which reads as follows:

“The General Assembly shall never authorize any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation or association whatever; or to raise money for, or loan its credit to, or in aid of any such company, corporation or association.”

An examination of this statute in question discloses that it does not provide for raising money or loaning credit to or in aid of any bank or other depositary named or contemplated in the statute. The city or corporation does not lend its credit to the bank or become liable for any of the bank's obligations.

“A general deposit by a county treasurer, of county funds, subject to check, is not a ‘loan,’ within the statutory or constitutional inhibition against the loaning of county funds with or without interest.” *Alibone, Treas., v. Ames et al* (Supreme Court of South Dakota), 68 North West. Rep., 165.

In *First National Bank of Stillwater v. Myron Shepard*, 22 Min., 196, the Supreme Court of Minnesota held:

“That part of the act of March 10, 1873, entitled ‘An act to amend General Statutes, Ch. 8, Sec. 131, relating to the duties of county treasurers and the care of the public funds,’ which provides for a deposit in banks by the county treasurer of the funds in the county treasury, is constitutional and valid and applies to all the funds in such treasuries.”

It may aid in the construction of Section 135 of the Municipal Code, that many other states with constitutional provisions similar to Section 6, Article VIII, have adopted and sustained depositary laws for the depositing of public funds. Among them are Kansas, Michigan, Nebraska, Georgia, Iowa, Minnesota, Wisconsin, Colorado, South Dakota, New York and Pennsylvania. These enactments by so many of the states favor the wisdom or policy of such statutes. They are adopted to provide for the safe keeping and disbursement of the public money of municipal bodies and at the same time to enable such bodies to receive a reasonable compensation for the funds when not demanded for public use. They are not against public policy or in violation of constitutional provisions, such as we have in

1904.]

Fairfield County.

Section 6, Article VIII of our Constitution. No other reason is urged against its constitutionality, excepting as being in violation of Section 6, Article VIII, and we are of the opinion that that section does not contemplate or inhibit the enactment of a statute having the object and purpose contemplated by Section 135 of the Municipal Code.

4. Is this depositary ordinance valid and lawful? It is assailed on two grounds: First, that the ordinance had a blank space left in it for the figures fixing the minimum amount of the bond to be given by the depositary, and that this blank was not filled in until after the ordinance was passed. Second, that the meeting of council at which the bond of the depositary was approved was a special meeting, notice of which was not given to all the members of the council. The first objection is not sustained by the facts and it will not be necessary to consume time in its further consideration. The second objection is one of a more serious nature and will require more extended review.

The meeting of the city council of August 10, 1903, at which the first depositary bond was approved, was a special meeting. Six of the seven members of council were present and unanimously approved the bond. One member was absent. The contention is that the action of the council at the special meeting is void because one member was not notified and failed to attend. It is conceded that there is no statute now in force relating specifically to the time, place or number of council meetings. Section 1677 of the Revised Statutes which formerly provided for special meetings was repealed by the act of October 22, 1902 (96 Ohio Laws, pages 96, 97). This question then is to be determined upon general principles and from the decision of courts touching the action of such bodies, as a municipal council at special or called meetings. Section 119 of the Municipal Code provides that "a majority of all the members elected shall be a quorum to do business." Section 121 provides, that "council shall determine its own rules," and Section 122 provides, that "no ordinance shall be passed by council without the concurrence of a majority of all members elected thereto." Since the repeal of Section 1677, Revised Statutes, the Legislature has not specifically fixed the time nor the place for the meetings

of the council. Nor do the statutes make any provision for notice to members either of regular or special meetings. A special meeting in question in this case was held at the council chamber; six members and all the officers were present; the meeting was organized in form as a council, and the proceedings were entered by the clerk upon the minute book and there attested by the signature of the clerk and president of the body. The only business transacted at the meeting was the adoption of a resolution approving the bond which was in conformity with the ordinance and former resolution of the council made in regular session. At the next regular meeting of the city council the minutes of the special meeting were read and approved. No charge of fraud or bad faith or concealment is made. The only question is whether the whole meeting was and is absolutely void.

It appears from the facts submitted to the court that the absent member of council at the time of the special meeting, was absent from the city, and no notice was served upon him. From these facts, what is the rule of law? In the case of *Cupp v. Commissioners*, 19 O. S., 173, 180, the Supreme Court held that two of the three of the board of county commissioners may hold a special meeting as such board and transact official business, because by the statute the two are a quorum and therefore competent to organize as the board. No mention is made of notice to the absent member. In the case of *The State, ex rel, etc., v. Trustees, etc.*, 20 O. S., 288, 293, the Supreme Court held that "special meetings of boards of township trustees may be held at any time and place within the township, and without previous notice to all the trustees; and that under the statute a majority of the board of township trustees constitute a quorum to do business at special meetings." In the case of *The State v. Herbert Atherton et al* (unreported), this court, in Licking county, held that the action of the board of health at a special meeting was valid, although two of the members were absent and one of them had received no notice of the meeting. In support of the conclusions in that case the following authorities were cited: *The State, ex rel, etc., v. Trustees, etc., supra*; *Place*

1904.]

Fairfield County.

v. *Taylor et al*, 22 O. S., 317; *Merchant v. North et al*, 10 O. S., 252, 257; *Bank v. Flour Company*, 41 O. S., 552, 558.

These decisions seem to the court as controlling in this case as to the legality of the special meeting at which the bond of the depositary was approved, and of which complaint is made in this proceeding. We therefore hold that the objection urged against the proceedings of council at its special meeting are not valid.

5. It is contended by defendant, that under Sections 135 and 136 of the Municipal Code, he, as treasurer, is vested with a discretion as to the deposit of the public funds in his hands, and therefore can not be compelled by proceedings in mandamus to exercise this discretion. Section 135, among other things, provides that:

“The treasurer, upon giving bond as required by council, may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the city, which may seem best for the protection of said funds, which said deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn, and all profits arising from said deposit or deposits shall inure to the benefit of said funds; provided, that such deposit shall in no wise release the treasurer from liability for any loss which may occur thereby.”

Where statutes are couched in words of permission, or declare that it shall be lawful to do certain things, or provide that they may be done, their literal signification is that the persons, official or otherwise, to whom they are addressed are at liberty or have the option to do those things or refrain at their election (*Sutherland on Stat. Con.*, Sec. 460). This rule is peculiarly applicable to the treasurer of a municipality as to depositing the public funds, under Section 135, for the reason he can not act without first obtaining the consent of his bondsmen. If they refuse the purposes of the law would be thwarted and rendered nugatory. Hence the wisdom of conferring authority on the council to provide for a depositary at competitive bidding.

Section 135 permissively makes provision for the treasurer of a city or municipality to deposit, with consent of his bondsmen, all funds and public moneys of which he has charge in such

bank or banks, situated within the city, which may seem best for the protection of said funds. It does not require him, only inferentially, to deposit it at a profit, but if a profit is received it shall inure to the benefit of the fund. This evinces the legislative intent to secure a profit by providing for the council of a city or municipality by ordinance to select a depository for the public funds at competitive bidding. If the treasurer does not see proper to exercise such discretion, or make an election to so deposit the funds, it would seem that he could not be compelled to do so. The purpose or legislative intent in providing for a depository may be presumed to be two-fold: (1) security for the public funds of a city or municipality; (2) to secure revenue for their funds while awaiting distribution. These purposes, so far as receiving revenue is concerned, may be defeated by the treasurer depositing the funds in a bank without any benefit or profit to arise from the deposit. The treasurer is not imperatively required to deposit the fund at all, and if deposited, it is not required of him to be at a profit; it is only when a profit is received it shall inure to the benefit of the funds.

In the same section (135) it is provided, that the "council shall have authority to provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer in such bank or banks situated within the city which may offer, at competitive bidding, the highest rate of interest, and give good and sufficient bond of some approved guaranty company, in a sum at least double the amount to be deposited, and to determine in such ordinance the method by which such bids shall be received, the authority which shall receive them, the time for the contracts for which deposits of public moneys may be made, and all details for carrying into effect the authority here given: provided, that all such proceedings in connection with such competitive bidding and deposit of such moneys shall be conducted in such manner as to insure full publicity, and shall be open at all times to the inspection of citizens," etc. The discretion thus given council, if it be a discretion, can not consistently with the rules of law be resolved in the negative, but is imperative: and mandamus

1904.]

Fairfield County.

would lie to compel action by the council. Sutherland on Stat. Con., Section 462, page 597, and authorities cited in note 1.

The rule is, that where power is given to public officers, as is given the council in Section 135, or in equivalent language, whenever the public interest calls for its exercise, the duty to so exercise the power is peremptory. In all such cases the intent of the Legislature, which is the test, is not to devolve a mere discretion, but to impose a positive and absolute duty (*Supervisors v. United States*, 4 Wall., 446, 447). A public duty, plain and specific, and positively required by law, is ministerial in its nature, and not calling for the use of discretion will be enforced by mandamus in the absence of other means of relief. *The State, ex rel, v. Moore*, 42 O. S., 103; *Commissioners v. Hunt*, 33 O. S., 169.

Section 135 provides that council shall have authority to provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer in such bank or banks, etc. The council of the city of Lancaster has acted under this authority, and have passed such ordinance and have notified the treasurer of their selection of a bank. He refused and still refuses to comply therewith. It does not appear from any pleading in the case that the treasurer has made any selection of a depository for the funds in his hands as treasurer. So the question as to his being prior in time, and therefore superior in right, does not arise in this case. But suppose he had exercised the right given in this section is his right paramount or equal to the rights of the council to select a depository by ordinance? Public policy would favor the claim of the council for this if no stronger reason. The council are to make their selection at competitive bidding and the law favors, everything else being equal, public sales to private sales.

It may be urged that Section 135 provides first, for the treasurer making the selection of a bank or depository for the public funds, and should he do so and make a contract with the bank so selected, then to permit the council as the legislative body of the city to pass an ordinance impairing the contract so made by the treasurer would be a violation of a constitutional right. This contention is not sound for this reason: The

contract would necessarily embrace within its terms the statute, and the right of council to pass an ordinance selecting a depository at competitive bidding, which is paramount to the treasurer's right to do so, and if he does make such contract it must be and remain subject to be annulled by the action of council in the exercise of its superior rights under the law.

It is urged that the proviso which provides, "that as to any deposits made under authority of an ordinance of council pursuant hereto, neither the treasurer nor his bondsmen, if the treasurer has exercised due care, shall be liable for any loss occasioned thereby," destroys the act as being unreasonable in holding the treasurer responsible for losses when his discretion to select a place of deposit is taken from him. This contention is to be tested by the meaning to be given to the phrase or words, "if the treasurer has exercised due care." What does the clause mean?

If the treasurer deposits the public funds according to the ordinance of council, and they are lost, he is not to be held liable unless his carelessness has contributed thereto; the carelessness contemplated is not related to the propriety of the ordinance or the character of the bank selected, or its bond, but the manner of dealing with the deposits after they are so made. If the treasurer should by carelessness give an order on the bank to the wrong person or for the wrong amount and the order is paid, in such case he is to be held responsible. Certainly this is only a reasonable provision and does not militate against the wisdom of the Legislature in drawing this additional safeguard around the public funds of a municipality.

6. It is urged that the provisions of Section 135 can not apply to the school funds.

The depository act says (Section 135) "Council shall have authority to provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer," etc.

Section 136, Municipal Code, provides, that "the treasurer shall receive and disburse all funds of the city including the school funds, and such other funds as arise in or belong to any department or part of the city government."

1904.]

Fairfield County.

Without further discussion we are of opinion that the school funds are subject to the same control as other public funds in the hands of the treasurer.

7. Are the bank's bonds sufficient?

It appears, and the court find, that when the ordinance was passed the treasurer had less than \$50,000 of public funds in his hands, including school funds. The first bond was fixed at \$100,000. The treasurer refused to comply with the ordinance, and on August 29, 1903, the city solicitor commenced this proceeding. He filed the petition on that day. The treasurer on that day had less than \$50,000 in his hands. On September 1, 1903, this court held its term in Fairfield county, commencing on that day. The parties appeared in open court and agreed that the trial of this case should be had October 21, 1903. The defendant was present in person and by counsel consented to said arrangement. On September 1, 1903, the treasurer received a payment of money from the county treasurer increasing the fund in his hands to \$63,000. On the 15th day of October, 1903, he filed his answer in this proceeding wherein it was alleged that he had this amount of money in his hands. Thereupon the depository bank filed with the city council a second and additional depository bond in the sum of \$100,000, making the amount of the bonds more than double the amount of funds in the treasurer's hands. This last bond was approved by council at a special meeting, all members being present.

The court find as a fact that when the first bond was given and when the treasurer first refused to obey the ordinance up to the day the petition was filed and the defendant appeared in open court, as above found, the bond was in double the amount of public funds then in his hands, and after the fund was increased as before found the second bond was given in the sum of \$100,000, making the bonds taken together more than double the amount of all the funds in the hands of the treasurer up to the time of this hearing. This raises the question whether by the giving of the second bond the provisions or the spirit of the law is complied with. If the act is constitutional and legal, and we hold that it is, there must be some reasonable and just method of carrying it into execution, and if the bond at any

time becomes insufficient in amount, a reasonable opportunity should be given to increase the bond, and we, therefore, hold that it was lawful and proper to give the second bond in this case.

The answer sets forth the fact that \$75,000, the proceeds of bonds, is about to come into his, the treasurer's, hands. The council should require an additional bond to cover this sum as all other sums in his hands, but it is only reasonable to assume that the required security will be given and required as changed conditions may arise. The council can not in advance determine what the fluctuating conditions arising from the sale of bonds that may be required as improvements or indebtedness are created by the city through its council, and therefore the statute, Section 135, gives authority to the council to arrange by ordinance all details for carrying into effect the authorities given the council by this section. But we think this question is really to be tested as to the situation at the commencement of these proceedings. The mandamus proceedings are legally commenced when the petition is filed, and not when the alternative writ is issued or served, for such a writ is not indispensable. The court takes jurisdiction and may issue the peremptory writ upon the petition alone, without the alternative writ or notice to the defendant (Sections 6743 and 6745, Revised Statutes). The rights of these parties must be determined as they existed at the time of the bringing of the suit and not at this date (*Tucker v. City of Newark*, 19 Cir. Ct., 1). The petition in this proceeding being filed August 29, 1903, and proceedings thus begun, the depository bond then given was sufficient and the defendant was in default in refusing to obey the ordinance and notice upon him to deposit the funds in the bank, namely, the Hocking Valley National Bank of Lancaster, Ohio.

We, therefore, hold that the relator is entitled to the peremptory writ prayed for in his petition, and it is accordingly ordered. The conclusions of the court necessarily imply the overruling of defendant's motion to strike out portions of the reply, and to save the question of the defendant, we here expressly overrule said motion, exceptions to be noted. Thereupon the defendant filed his motion for a new trial which was over-

1904.]

Cuyahoga County.

ruled. Exceptions. Ten days allowed for finding of fact and statutory time for bill of exceptions.

Augustus W. Mithoff, City Solicitor, and *C. W. McCleery* and *Geo. E. Martin*, for plaintiff.

James W. Miller, *C. D. Martin* and *M. A. Daugherty*, for defendant.

ABUTTING OWNERS RIGHTS IN STREET.

[Circuit Court of Cuyahoga County.]

CLEVELAND BURIAL CASE CO. v. ERIE RAILWAY CO.

Decided, June 21, 1902.

Street—Easement of Abutting Owner Therein a Property Right—Impairment of by Railroad Track May be Enjoined—Proximity of Track an Interference, When—Injunction.

1. The granting of an ordinance by a municipality permitting a railway company to lay a track along the street, does not empower the company to construct the track in such a way as to materially interfere with the easement of an abutting owner, without first obtaining the right so to do by appropriation or otherwise.
2. The laying of a track in the street within twenty-six feet of the entrance to a factory, where wagons are loaded and unloaded, constitutes such a material interference with the rights of the owner of the factory, and an injunction will lie upon his petition.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Heard on appeal.

The plaintiff, a corporation, is the owner of a parcel of land in the city of Cleveland, bounded on the northerly side by Old River street, on the easterly side by Elm street, on the southerly side by ———, and on the westerly side by West Center street. On this tract of land the plaintiff has a manufacturing establishment covering a considerable part of the tract, with a front of about 140 feet on Center street, and about 200 feet on Old River street; the lines of the manufactory on each of these streets being coincident with the street, so that the northwest corner of the building is at the intersection of the south

line of Old River street and the east line of Center street. These premises are in a district largely occupied by manufacturing establishments.

The defendant, which is a railroad corporation, has a number of railroad tracks in the immediate vicinity, and other railroads have tracks not far removed, but on the opposite side of the old river bed from the premises of the plaintiff. One of the tracks of the defendant crosses Old River street in a westerly direction from the northwest corner of the plaintiff's manufactory, its nearest point to the manufactory being at a distance of sixty-seven feet therefrom. This track curves to the eastward when it reaches the north line of Old River street and thence extends eastwardly along the north side of said last-named street in front of the plaintiff's manufactory.

The defendant has, by an ordinance of the city, obtained a franchise to construct an additional track diagonally across the corner of Old River and Center streets, the point where it crosses the south line of Old River street being about thirty feet from the intersection of the west line of Center street with the south line of Old River street; thence extending northeasterly, crossing the north line of Old River street ten or fifteen feet easterly from the east line of Center street produced. This track will bring the rail, which is on the northeasterly side of the track, twenty-six feet from the northwesterly corner of the plaintiff's manufactory.

The defendant proposes to construct its track as authorized by such ordinance, and will do so unless restrained by the order of the court. The court of common pleas allowed an order restraining such construction until the case should be heard in that court upon its merits. Subsequently, upon motion of the defendant, this order was dissolved, and from such order the appeal is taken to this court.

Each of these streets is sixty-six feet in width. The title to the tract of land owned by the plaintiff is derived through several warranty deeds executed by different parties and conveying the several lots, of which the tract is composed, by lot numbers. These lot numbers are obtained from a survey and plat

1904].

Cuyahoga County.

of lots made by the Buffalo Company and recorded in the records of Cuyahoga county. On this plat the several streets are designated. On the part of the plaintiff it is claimed that it is the owner of the fee to the center of the streets by which its manufacturing plant is bounded; while, on the part of the defendant, it is said that the fee of the streets is in the public authorities in trust for use for street purposes. In the view we take of this case, it is not necessary that this question be now determined.

The plaintiff, in any event, has an easement in the streets upon which its premises abut, and this easement is said, in the case of *Cincinnati & S. G. A. St. Ry. Co. v. Cumminsville*, 14 Ohio St., 523, 524, to be "as much property as the lot itself." Numerous authorities by our own Supreme Court are to the same effect; and it is settled beyond controversy that, in a case like this, if the proposed construction of the track by the defendant will materially interfere with this easement, an injunction will be allowed to prevent such construction until the rights of the plaintiff have been obtained by proper appropriation, purchase, or other proceedings whereby its property interest in this easement is to be acquired by the defendant.

The only question remaining is, whether, if this track is constructed as proposed, the rights of the plaintiff, by reason of this easement, will be materially or appreciably interfered with. This is purely a question of fact. From the evidence, including a plat of the premises showing the location of the building and the line of the proposed construction, we find that the plaintiff's rights will be thus interfered with. Without entering into any lengthy discussion of how the plaintiff's rights will be interfered with, attention is called to the fact that the convenience of loading and unloading teams at the Center street entrance must necessarily be impaired. The evidence shows that these streets are used very considerably by the public for teams, and the construction and operation of a railroad within twenty-six feet of the corner of this building must certainly make it much less convenient to drive teams from one of these streets to the other around the corner.

In the case of *Callen v. Electric Light Co.*, 66 Ohio St., 166, it is held that:

“The placing by a private lighting company of poles at the curb in a street and the stringing thereon of electric light cable lines and wires for the purpose of furnishing light and energy to private takers, is a diversion of the street from the purposes to which it was dedicated, and is a taking of the property of the abutting owner, within the meaning of Section 19, Article I, of the Bill of Rights. And such placing of poles, lines and wires is none the less an unauthorized taking, even though it be consented to by the city authorities.”

In that case an injunction was allowed. We think the plaintiff's right to an injunction in the case *now* being considered is stronger than that stated in the syllabus just quoted.

In the case of *Valley Ry. Co. v. Pouchot*, 4 C. C., 187, an opinion delivered by Judge Upson, then of this court, considers very fully the most of the questions of law involved in this case. That case was affirmed by the Supreme Court upon such opinion of Judge Upson. It is deemed unnecessary to here repeat the reasoning there used and the authorities there cited.

The motion to dissolve the restraining order, which is pending here on appeal, is overruled.

Williamson & Cushing, for plaintiff.

Mr. Shellenbarger and *Judge Lamson*, for defendant.

1904.]

Marion County.

ACTIONS FOR RECOVERY OF LAND.

[Circuit Court of Marion County.]

JOHN T. MONNETT V. THE COLUMBUS, SANDUSKY & HOCKING
RAILROAD COMPANY AND JOSEPH ROBINSON, AS RE-
CEIVER OF SAID RAILROAD COMPANY.

Decided, January Term, 1904.

*Jurisdiction—Question as to, Must be Determined, Though Not Insisted
On—Federal Questions—Signature to Paper Obtained by Subter-
fuge—Relief from a Contract Plaintiff did not Read Before Signing
—Condition—Covenant—Ancillary Relief.*

1. Where there is an issue as to the jurisdiction of the subject matter of the action, a defendant does not lose or impair his right to insist that a case is lawfully in the federal court, by making a defense in the common pleas or by appealing to the circuit court, and the question of jurisdiction is for determination whether insisted on by the defendant or not.
2. Prayer for the cancellation of certain writings, alleged to have been fraudulently obtained by the receiver of a railroad company appointed by a federal court, evidential in their nature and material to the issue in hand, does not raise a federal question.
3. Nor does a claim against a railroad company of title to property held by its receiver raise a federal question; and the controversy would not be separable as to the defendant receiver, even should it be assumed that a federal question was involved.
4. The plaintiff's contention as to the obtaining of an alleged release of claim by subterfuge will be held to be established, where the facts and circumstances are as in this case.
4. The plaintiff's contention as to the obtaining of an alleged release of claim by subterfuge will be held to be established, where the facts and circumstances are as in this case.
5. Courts will not refuse to listen to one asking relief from a contract which he failed to read, but on the contrary will grant relief where fraud is charged and shown in the matter of reading the contract to him or in stating its nature of terms.
6. In the case at bar the writing termed a release is declared null and void as relief ancillary to any proper action at law which plaintiff may see fit to commence.

MOONEY, J.; NORRIS, J., and DAY, J., concur.

This action is here on appeal from the court of common pleas. The petition states that the railroad company, defendant,

is a corporation duly incorporated under the laws of this state and the defendant Robinson is the duly appointed and acting receiver of said company under appointment of the United States District Court of the Southern District of Ohio, and is under said appointment in the possession and control of all the property of every kind of said railroad company, including the real estate in said petition described; that on April 28, 1893, plaintiff, without consideration, by his deed of general warranty of that date conditionally conveyed to the Sandusky & Columbus Short Line Railway Co., an Ohio corporation, its successors and assigns, five and ninety-three one-hundredths acres of land situate in the township of Grand Prairie in this county and specifically described in the petition; that said deed had incorporated in it this language: "This conveyance is made conditioned upon said The Sandusky & Columbus Short Line Railway Co. locating a station, constructing a station house, telegraph office, stock yards, sidings and necessary improvements upon the first described real estate, and maintaining station and said constructions thereon, and causing all regular trains operated upon said railway to be stopped at said station a reasonable length of time while said railway shall be operated by said The Sandusky & Columbus Short Line Railway Co., its successors and assigns, except through passenger and freight trains;" that said deed was duly recorded and said grantee thereupon entered upon said premises and occupied the same under said deed until the same was sold and conveyed in legal proceedings had in an action pending in the Court of Common Pleas of Crawford County, Ohio, to a committee of the bondholders of said railway company and said committee afterwards sold and conveyed the same to defendant railroad company, which company and its receiver, defendant herein, have succeeded to the right and title of the grantee in the first mentioned deed; that the condition of said deed has never been performed; that defendant railroad company is insolvent; that the receiver has no title to nor interest in said land under his appointment, except as receiver; that defendants claim to have been released from all the conditions of said deed by a certain

1904.]

Marion County.

writing or writings now in their possession, but of which they refuse to furnish plaintiff with a copy.

Plaintiff says that about 1897 "defendant railroad company or one of its many receivers recognizing their liability and duty to perform the conditions in said conveyance from plaintiff tendered plaintiff a pass on their said railroad as a temporary solace for their delay in carrying out the said conditions, and when said pass was delivered the agent who handed same to plaintiff requested him to sign a document which he said the red tape of the company required, but which was actually an acknowledgement of his receipt of the pass; that plaintiff informed said agent that he did not have his spectacles with him, without which he was unable to read said document, but said agent assured plaintiff that such was the only effect of the document and that he could rely upon the statements of the agent as to its contents being as herein stated, and not otherwise. That thereupon he executed said paper, relying upon the statements of said agent, and if the same contained anything other than a receipt for the said pass, it is a gross fraud upon plaintiff's rights, was obtained from him by false representation and false pretenses, and ought to be canceled, and declared void and of no effect." The prayer of the petition is that all releases or pretended releases in the possession of defendants be found to be fraudulent and be canceled; that all rights of defendant under said deed of conveyance from plaintiff be declared forfeited and said deed be canceled; that defendants be adjudged to convey the legal title to said lands to plaintiff and in default thereof that a decree to be entered operate as said conveyance to plaintiff, and that defendants be enjoined from asserting any title to said premises and for all proper relief.

In due time "the defendants, Joseph Robinson, as receiver of The Columbus, Sandusky & Hocking Railroad Company, and The Columbus, Sandusky & Hocking Railroad Company, by Joseph Robinson, receiver thereof," filed a petition for removal to the Circuit Court of the United States for the Northern District of Ohio, Western Division, and duly filed a proper and sufficient bond for such removal. The petition for removal states that in an action pending both in the Circuit Courts of

the United States for the Northern and Southern Districts of Ohio, one Samuel M. Felton was duly appointed as receiver of all the property of the railroad company, defendant, and duly qualified; that Monnett, the plaintiff here, in consideration of an annual pass received from Felton, receiver, released him and said railroad company from the performance of the condition of said deed of conveyance and that said release is attacked by plaintiff in this action; that after said release was executed Felton resigned as said receiver and defendant Robinson was duly appointed in his stead by both said courts and that the question in dispute, exclusive of interest and costs, the sum of value of \$2,000, and the suit is one arising under the Constitution and laws of the United States.

This petition for removal was dismissed by the court of common pleas. Defendants then moved to dismiss the action upon the ground that the same was commenced without leave first obtained from the courts appointing said receivers or either of them. In support of this motion defendant, Robinson, filed his affidavit stating that "he is in possession of the property described in the petition herein which the plaintiff seeks to recover solely by virtue of said appointment (as receiver), and that he has no relation to or connection with said property otherwise than as such receiver."

This motion was overruled and defendant Robinson, as receiver, filed his answer containing the statement of four defenses: (1). That the court had no jurisdiction for the reason stated in his motion to dismiss as heretofore recited. (2). Denies that defendant railroad company holds said real estate subject to any condition; that it assumed any liability on account of said condition of the original grantee, or that any rights of defendant railroad company under plaintiff's deed have become or are forfeited; states that the original grantee established a station and constructed stock yards and necessary sidings on said premises and plaintiff never demanded any further compliance with or performance of said condition until after said railroad property, including said premises, was sold by said grantee. (3). That in consideration of an annual pass, plaintiff, on September 21, 1897, released said condition to Felton, receiver. (4).

1904.]

Marion County.

That on May 16, 1895, and again on May 16, 1895, plaintiff sold, assigned and transferred to one David Rexroth all his rights under or by virtue of said condition.

Plaintiff by reply denies all the averments of the answer, and further says that defendants repudiated said pass and deprived plaintiff of the benefits thereof.

The case was heard and submitted upon the pleadings and the evidence. Defendants did not urge here any claim based upon the petition to remove or the motion to dismiss the action. However, they did not lose or impair their right to insist that the case has been lawfully removed into the federal court by making defense in the common pleas, nor by appealing to this court (*Powers v. Chesapeake, etc., R. Co.*, 169 U. S., 103). The question is one of jurisdiction of the subject of the action, and is here for determination, whether insisted upon by defendants or not.

Plaintiff's petition, construed in the light of its prayer, asserts two claims of relief against defendant: (1). The cancellation of certain writings evidential in their nature and material to the ultimate right claimed in the case, which writings are alleged to have been fraudulently obtained from plaintiff by Felton, receiver. (2). To quiet plaintiff's title or to declare a forfeiture in his favor to certain realty, color of title to which is vested in the defendant railroad company and the legal custody of which without any other title or interest therein is held by the receiver defendant.

The first claim involves no federal question (*Gabelman v. Peoria, etc., R. Co.*, 179 U. S., 339). The second claim involved the title to the property. That title was in the railroad company if not forfeited, and in the plaintiff here if it was forfeited. In no point of view was it in the receiver. The appointment of the receiver did not dissolve the corporation. It might be sued afterward as well as before; and while no decree or judgment rendered against the railroad company could operate to disturb the custody of the receiver or his management of the railroad property, the decree or judgment otherwise and between the parties to the action would be valid and binding. The order of sale in the foreclosure suit in the federal court could not impair

this validity. The title of the railroad company to this realty was of record, the mortgagees acquired their interest with notice, the title of the mortgagees was no greater than the railroad company, and the order of sale so far as the pleadings now show was likewise limited. The action then so far as the second claim is concerned and against the railroad company defendant involved no federal question, and the controversy does not appear to be separable as to the defendant receiver, even though it be assumed that the federal question was involved as to him. The court of common pleas in the first instance had, and this court on appeal now has, jurisdiction of the action, and the petition to remove is denied and the motion to dismiss the action is overruled.

At the trial the evidence was conflicting only as to the circumstances under which the writing of date, September 21, 1897, purporting to be a release and satisfaction by plaintiff of the clause in the deed in question, was signed by plaintiff. Plaintiff gave evidence tending to show that on the occasions prior to the transaction in question the railroad company or its receiver has given him a pass over the line and each time took receipt for it; that these passes were given to compensate plaintiff for the railway company's delay in complying with the requirements of the deed; that on September 21, 1897, Mr. McCune, an agent of the receiver, came to him, tendered him a mileage book, remarking that as part of the receiver's red tape he would ask plaintiff to sign a receipt for it; that plaintiff thereupon stated that he could not read the document without his spectacles, and he requested Mr. Weber, in whose restaurant or saloon the transaction took place, to procure spectacles for him, and Weber, after investigation, said he could not; that upon McCune's assurance that the receipt was all right, he signed the writing without reading or being able to read it; that in signing he believed it to be a receipt merely, and that he had never in fact agreed to release said railroad company from any claim he had on account of said deed.

Defendant's evidence tended to show that the release was handed to plaintiff at the time without any statement as to its character; that plaintiff looked it over and appeared to be read-

1904.]

Marion County.

ing it, and after such examination he signed it, without any statement as to spectacles or any request to be supplied with the same; that it was not a mileage book, but a pass that was handed to him at the time. Defendants do not deny that other passes had been given to plaintiff before that time, and that more receipts were given by the plaintiff for them, and Mr. McCune says that he had no conversation with plaintiff as to an agreement to release either before or at the time of this transaction, and it is not shown by defendants that any such agreement to release was ever made by plaintiff with any other person representing either the railroad company or the receiver, unless signing the purported release here in question amounted to such agreement. There is a sharp conflict in the evidence as to the part of the room at which the signature was written, but none that the time was late in the afternoon.

From the issue of former passes, taking receipts for the same, the limited duration that the pass issued September 21, 1897, had to run, and its comparatively insignificant value, the absence of any prior agreement to release and the absence of any discussion or conversation relating to a release at the time, from the tenor of plaintiff's letter to McCune, of date February 18, 1900, from which it appears that then for the first time plaintiff was informed that a release was claimed, and from the apparently conceded fact that plaintiff at all times, from September 21, 1897, asserted a claim against the company under the provisions of said deed, we are convinced that plaintiff's contention as to the facts is the very truth of the case. We so find and hold.

We are of opinion that plaintiff's failure to read the document which he signed will prove no obstacle to the relief which he seeks by way of cancellation and reformation. It is true that courts turn a deaf ear to a man who seeks to get rid of a contract solely on the ground that its terms are not what he supposed them to be. But courts will not refuse to listen; on the contrary, they will give relief, when a plaintiff charges fraud upon the defendant in reading the contract to him or in stating its nature and terms (*Foster v. Mackmannon*, L. R., C. P., 704; *Albany Inst. for Savings v. Burdick*, 87 N. Y., 40, reviewing

N. Y. cases; *Hawkins v. Hawkins*, 50 Cal., 558; *Schuykill v. Copley*, 67 Pa. St., 386; *Lunnington v. Strong*, 111 Ill., 152; *Moon v. Brown*, 49 Iowa, 130; *Martindale v. Harris*, 26 O. S., 379). This would obviously be true of cases in which the complaining party could not read (*Kenney v. Ensminger*, 87 Ala., 340), or could read only with difficulty (*Keller v. Equitable Ins. Co.*, 28 Ind., 170). The presentation of this release for signature without previous discussion or agreement as to its terms, taken in connection with the previous pass transactions and in the other circumstances of the cases amounted to a fraud upon plaintiff.

It is contended by defendants that plaintiff has transferred all his rights under the provisions of the deed in question to one Rexroth before the commencement of this action, and that plaintiff can not maintain this action. The evidence shows that at the date of the deed by plaintiff to the railroad company, plaintiff was seized in fee of some 800 acres of land in a body situated near and perhaps surrounding the proposed site of the railroad station. A part of this land he contracted to convey to Rexroth. This contract, dated May 16, 1895, among other things, provides that Rexroth, upon complying with the terms of sale, "shall have the benefit of the contract with the railway company so far as the same can be legally transferred to him." On August 30, 1895, the deed of conveyance from plaintiff to Rexroth being executed but not delivered, because the consideration was not fully paid, the parties entered into a further contract as to the subject-matter of the conveyance and the use of the premises until the full payment was made by Rexroth. This contract of August 30, 1895, provides:

"The form scales on the farm are to go with it to Rexroth and become his property on the delivery of the deed (the said scales are located on the railway lands); the said John T. Monnett hereby assigns and transfers to said David Rexroth the benefit of his contract with The Columbus & Sandusky Short Line Railway Co., as fully as the same can be legally transferred by him, all as provided in his written contract of sale of said lands."

This contract was not acknowledged and the deed of conveyance to Rexroth, it seems, contained no reference to the Short

1904.]

Marion County.

Line deed or the provisions thereof here in question.

Plaintiff here contends that the provisions of the Short Line deed creates a condition subsequent. Defendants insist that it creates a covenant merely. We are of opinion that in any view it must be either one or the other. If now it be a condition subsequent, only the grantor and his heirs can take advantage of it. It is not legally transferable by the grantor by contract or conveyance (21 Wall., 44-63; 97 U. S., 693; 4 Kent Com., 127; Co. Lett, 214*a*, 12 Allen, 141). If the provision is a covenant, it binds the assigns of the original grantee by its terms and it runs with the land held by the grantor at the time of making the Short Line deed (106 N. Y., 142-154 and 155; 115 N. Y., 361-376; 25 O. S., 560). If, however, it be a covenant in this sense it can not exist independent of the conveyance of which it forms a part nor antedate the title to benefit which it exists. If, then, the provision be a condition subsequent, the contracts with Rexroth are immaterial, because the benefit of the condition was not legally transferable, and Monnett agreed to transfer the benefit only if the same was legally possible and to the extent that it was legally possible. If the possession be a covenant, then we assume that it can not exist in gross, but runs with the land, passing, until released, as an incident upon the conveyance of the land for the benefit of which it exists and the date or transfer of the covenant being necessarily the same as the conveyance of title to the land benefitted. Until the deed of Rexroth was delivered, he could have no benefit of the covenant, if it be such, passed to him, not by force of any contract, but by virtue of the deed. Hence, in this view the contract is also immaterial.

Whether the possession is in fact a condition or a covenant is, in the absence of a clause of forfeiture or of re-entry, a very difficult question to determine. Under such circumstances the same words may be used to create a condition as to create a covenant (130 Mass., 180). The question is one of intention of the parties, to be ascertained from the entire instrument and the circumstances, and not on one of technical language used (4 Kent Com., 132). Different courts upon language identical or similar have frequently differed in conclusions reached. In

view of the difficulty of the question, it is therefore a matter of relief to recognize, and therefore to hold that in the present case it is a matter of no consequence whatever whether the language be held to create a covenant or a condition subsequent.

If it is a condition, the penalty for breach would be a forfeiture of the estate. It is elementary that a court of equity will never enforce a forfeiture by its affirmative action.

“A court of equity sometimes releases against forfeitures, but it is not the forum to which to resort to enforce them.”

Justice v. Lowe, 26 O. S., 372. In this case it is urged by plaintiff that the Short Line deed should be canceled; not to enforce a forfeiture, but to quiet title of plaintiff to the lands in question or to remove a cloud from plaintiff's title. Plaintiff is not in possession of the lands described in the Short Line deed. He claims no estate in remainder or reversion in said lands, but an entire present estate in fee simple. Equity entertains jurisdiction of an action to quiet title by plaintiff in possession, because by reason of his possession he can not proceed at law against an adverse claimant. For similar reasons our statute gives to a plaintiff out of possession, and who has or claims an estate or interest in reversion or remainder, an action to remove a cloud or quiet title against an adverse claimant? (Section 5779, Revised Statutes). But this latter provision does not extend to one out of possession who claims the entire estate or a present right of possession merely. *Raymond v. Railway Company*, 57 O. S., 271.

“As to whether possession by a plaintiff is necessary before he can resort to equity to remove a cloud, there appears to be some conflict of opinion, arising from loose statements of judges and an overlooking of the principles of equity in regard to exercise of its jurisdiction. Where the estate or interest to be protected is equitable, the jurisdiction should be exercised, whether plaintiff is in or out of possession, for under these circumstances legal remedies are not possible; but when the estate or interest is legal in its nature, the exercise of the jurisdiction depends upon the adequacy of legal remedies. Thus, for example, a plaintiff out of possession holding the legal title will be left to his remedy by ejectment under ordinary circum-

1904.]

Marion County.

stances." 3 Pom. Equity Jurisprudence, Section 1399, note, citing cases.

In this case plaintiff's asserted title to the land, if the provision in the deed be a condition, is a legal estate; to cancel the Short Line deed as a cloud would be to lend the aid of equity to enforce a forfeiture; and if the estate was forfeited, a court of law would adjudge it upon the same evidence or even less evidence than would be required in a court of equity to cancel the deed if the case as one proper for that remedy. For all these reasons the remedy at law is adequate and the deed should not be canceled.

If the provision is a covenant, the remedies in the event of failure to perform are (1) at law for damages, and (2) in a proper case, in equity for specific performance. This is not an action for damages for breach of the covenant, and the evidence in the case makes it very clear that the plaintiff neither insists upon nor desires a specific performance of the covenant. Hence, in case the provision be a covenant, plaintiff can not have in this court the one relief and does not desire the other to which in the case he might be entitled.

Upon the whole case, we are of the opinion that plaintiff is entitled to have the writing of date September 21, 1897, reformed so as to be in form and substance a mere receipt for the pass then delivered, and to have said writing as a release declared null and void and therefore canceled. This relief is ancillary to any proper action at law which plaintiff may see fit to commence. What that action shall be or whether plaintiff has any cause of action, this court at this time does not desire to either determine or intimate. All relief prayed for by plaintiff, except the reformation and cancellation indicated, is denied.

Scofield, Durfer & Scofield, for plaintiff.

J. F. McNeal & Sons and Lawrence Maxwell, for defendant.

INCUMBRANCE ON INSURED PROPERTY.

[Circuit Court of Pickaway County.]

LEWIS C. HAMMEL v. INSURANCE CO. OF PENNSYLVANIA.

Decided, 1902.

Fire Insurance—Condition in Policy Against Incumbrances—Failure to Attach Policy to Bill of Exceptions or to Properly Identify It—Effect of Such Failure—Condition in Policy can not be Defeated by Parole Evidence.

1. A policy of fire insurance marked Exhibit "A" is not properly identified and can not be considered by the reviewing court, where it is not attached to the bill of exceptions and is referred to in the bill as Exhibit "B."
2. But such failure to properly identify or attach the exhibit does not require that the bill of exceptions be stricken from the files where it appears that questions are properly presented for review other than those involving the exhibit.
3. Evidence that at the time a policy covering personal property was written the assured informed the agent that the property was incumbent is inadmissible for the purpose of varying a provision of the policy rendering it void in case the property is covered by chattel mortgage, unless otherwise provided by agreement indorsed thereon.

JONES, J. (orally); CHERRINGTON, J., and SIBLEY, J., concur.

Heard on error.

The petition in the court below was upon a policy of insurance issued by the defendant company to L. C. Hammel & Co., upon certain chattels owned by the defendant, L. C. Hammel. The petition, after setting forth the description of the chattels, avers that at the time of the issuing of the policy in the name of L. C. Hammel & Co. there was a chattel mortgage on the goods and chattels described in the policy, but that the defendant had notice and knowledge of the fact of the existence of that chattel mortgage; it avers the loss and proof of loss and asks judgment for the plaintiff.

The third defense alleges that said policy of insurance, issued to said L. C. Hammel & Company, contained a provision that said policy, unless otherwise provided by agreement in-

1904.]

Pickaway County.

dorsed thereon, or added thereto, should be void if the subject of insurance be personal property and be or become incumbered by chattel mortgage, and the defendant then alleges that prior to and at the time of the issuing of said policy of insurance to said L. C. Hammel & Company, by this defendant, said property, goods and chattels insured by said policy of insurance were covered by a chattel mortgage in the sum of \$911.50; that there was no agreement indorsed upon said policy or added thereto, consenting to or permitting the lien of said chattel mortgage upon said property so insured by this defendant. Defendant further alleges that at the time it issued said policy of insurance it had no knowledge or notice of the existence of said chattel mortgage.

To obviate the effect of that defense, the plaintiff filed a reply wherein he denies the allegation in said answer that at the time said policy of insurance was issued, said defendant had no knowledge or notice of the existence of said chattel mortgage, and he denies the allegation that the defendant has in no manner waived said condition and provision contained in said policy of insurance; and sets up the fact that the defendant company's agent had notice of the incumbrance upon the chattel property by way of mortgage, and that he, the plaintiff, had no knowledge of any provision in said policy of the character, manner and description set forth in said third defense at the time said policy was issued and delivered to him, and that said agent did not advise or inform him of said provisions, nor that it was necessary that any endorsement should be made upon said policy or added thereto, consenting to or permitting the existence of said chattel mortgage upon said property.

The plaintiff offered his evidence, and at the conclusion of that evidence the defendant moved the court to direct a verdict in its behalf; this the court did, and the verdict was returned by the jury for the defendant. A motion for a new trial was filed; that motion was overruled and a petition in error was filed in this court.

A motion was made by the defendant in error to strike this bill of exceptions from the files. That motion will be overruled,

but in so far as the bill of exceptions does not contain a copy of the insurance policy pleaded in this case, we will disregard the policy itself. In other words, the court holds that we are not permitted to consider the alleged copy of the policy in this case as being in evidence before this court (although it was before the court of common pleas), for this reason: the bill of exceptions refers to a policy of insurance as having been offered in evidence, but the policy is not in the bill of exceptions; it refers to a policy marked Exhibit "B," and the alleged policy is marked Exhibit "A," and is not in any way attached to the bill of exceptions, offering us no particular way of identifying this policy as the policy offered in evidence; so that in passing upon this case we will pass simply upon the effect of the evidence, as to whether or not it has a tendency to prove a case for the plaintiff below.

While there are a number of questions and answers objected to by the defendant below, a large number of which were properly objected to and properly excluded by the court, the main contention arises as to the action of the court in ruling upon questions and answers found in the bill, relating to the fact whether or not the defendant company, through its agent, had notice of the fact that there was an incumbrance by way of a chattel mortgage upon the property described in the policy of insurance.

It seems from the evidence that one Harry Van Hyde was the agent of the defendant company, and the agent of other insurance companies as well; that some time in 1898 (the plaintiff offered evidence to prove, which was rejected by the court), this agent was told at that time, when attempting to negotiate insurance in another company, for which he was agent, that there was an incumbrance upon this chattel property; and later, when this agent, Van Hyde, did negotiate insurance for plaintiff in the defendant company, testimony was offered to show that, at that time, the plaintiff told the agent that there was a lien by way of a chattel mortgage upon his property. All of this evidence was excluded by the court upon the theory, no doubt, that it was incompetent to introduce any evidence which

1904.]

Pickaway County.

would in any way tend to render nugatory the terms of the insurance policy; and, without reading the various questions and answers touching this matter, that is the bone of contention in this case, whether or not this particular evidence was competent.

We have come to the conclusion that the evidence was incompetent. The evidence, if introduced and allowed to go to the jury by the court below, would have had the effect, in our opinion, of reading into the policy a provision that was in direct opposition to that clause found in the policy. Here was a policy of insurance which provided that if there was any incumbrance of this character upon the property, that the policy, unless otherwise provided by agreement endorsed thereon or added thereto, should be void. The effect of the evidence, if allowed to be introduced, would have been practically to read that provision out of the policy.

It is true that there are a large number of adjudicated cases wherein the agents of insurance companies are allowed to waive certain provisions, rendering the policies void, but that does not come within the purview of this case. It is not a question of the waiver of a contract which has been executed; it is a question as to the provisions of a contract that was made at that time. If it be permitted to introduce parol evidence to wipe out of the insurance policy this particular provision, it would be competent to wipe out others under the same rule. We do not think that the question of waiver affects this case, for waiver makes practically a new contract which is always permitted. We think that *Smith v. Insurance Co.*, 19 Ohio St., 287, 290, is practically decisive of this case. The opinion of Judge Welch, who was always concise, is brief, and I will read a few lines of it. Judge Welch said:

"We see no error in the rulings of the court below. The charter of the company is expressly made obligatory upon all its members. It expressly declares that policies issued upon incumbered property, without a written application containing a statement of the incumbrance, shall be void. This provision admits of no construction, and no attempt is made to avoid its effect in the present case by proof of fraud or mistake.

It is the law of the parties, adopted by themselves, and becomes part of their contract. By it they have declared and agreed that this form of *written* notice shall be essential to the validity of the policy, and that *verbal* notice can not be substituted for it."

So that we think this question has been practically decided by the Supreme Court as early as the case of *Smith v. Insurance Co.*, *supra*, and for these reasons we affirm the judgment of the court below.

Abernethy & Folsom, for plaintiff in error.

J. W. Mooney and G. E. Bibbie, for defendant in error.

BILLS OF EXCEPTIONS.

[Circuit Court of Lorain County.]

HENRY W. MANLEY v. WHEELING & LAKE ERIE RAILWAY CO.

Decided, October 12, 1902.

Journal Entry Necessary—Making a Bill of Exceptions Part of the Record—Presumption—That the Court Below Acted in Accordance with Law.

1. A bill of exceptions does not become a part of the record and can not be considered unless it is made a part of the record by a journal entry; the only exceptions that can be saved by noting the exception in the journal entry are such as are made to decisions and to orders of court required to go upon the journal.
2. In the absence of a bill of exceptions or a finding of facts, it will be assumed on review that the court below acted wholly within the law.

HALE, J. (orally); CALDWELL, J., and MARVIN, J., concur.

Heard on error.

The case of *Manley v. The Railroad Company*, error to the court of common pleas, brings before us a record of the probate court of this county, the judgment of that court having been affirmed by the court of common pleas. It is sought in this proceeding to reverse both judgments.

The case grows out of a proceeding for the appropriation of

1904.]

Lorain County.

property to the use of a corporation. Proceedings were instituted under Section 6448, Revised Statutes, which provides for proceedings to appropriate land when that corporation is in possession of the lands without any agreement with the land owner.

The proceedings were instituted by the land owner. On the trial before the probate court a bill of exceptions was taken by the plaintiff, against whom judgment was rendered; but there is no journal entry making the bill of exceptions a part of the record, and without such journal entry it does not become a part of the record and can not be considered.

Only such errors, if any, as appear in the record, excluding the bill of exceptions, are before this court. The Supreme Court have several times said the only exceptions that can be saved by noting the exception in the journal entry are such as are made to decisions and orders of the court required to go upon the journal, and are properly entered there. There is no irregularity pointed out in the proceedings up to the time the case was called for trial in the probate court.

It appears that the defendant, the railroad company, had demanded a jury to try the case. A venire had issued for the jury, and ten of the men named in the venire appeared in the probate court on the day of the trial, and the journal entry shows that the defendant withdrew its request for a jury, and consented that the issues raised be tried by the court. The plaintiff objected to the discharge of the jury, but did not demand that the case should be submitted to the jury, whereupon the jury was discharged, to which the plaintiff excepted. The case then proceeded to trial before the court, and the court having heard the evidence and arguments of counsel, reserved his decision, and later rendered a judgment in favor of the defendant, the railroad company.

The only exception taken here was to the discharge of the jury. Ten men who had been selected to act as jurors only reported, and these were discharged. Now, if we concede that it was proper to place upon the journal the fact that the venire had been recalled, or that the jurors appearing had been discharged, then there is a total failure to show for what reason,

acting' on what facts the court discharged that jury. There might have been ample reasons for discharging the jury. We must assume, in the absence of any finding of facts and of a bill of exceptions, that the court acted wholly within the law. We can not assume that the court erred in discharging the jury in the absence of the facts upon which the court acted in making that order. The journal entry shows that the plaintiff did not demand a jury, but proceeded to trial without any protest or without any objection other than to the discharge of the jury.

A trial was had before the court, and decided against plaintiff in error, and we think he must abide by the result. He produced his evidence and tried his case to the court, without any objections to a trial in that way, and saved no exceptions to such trial. This would constitute a waiver on his part to a jury, to which he was clearly entitled.

When the bill of exceptions was stricken off, all rights that were undertaken to be saved to the plaintiff in error that had any substance in them were lost to him. There is nothing in the record outside of the bill of exceptions of any account.

The judgment of the court of common pleas is affirmed.

INJURY FROM CONTACT OF TELEPHONE WITH TROLLEY WIRES.

[Circuit Court of Lorain County.]

**THE NORTH AMHERST HOME TELEPHONE COMPANY AND THE
C., E. & W. RAILWAY COMPANY v. CLINTON
JACKSON, AN INFANT.**

Decided, October 8, 1903.

Negligence—Where Telephone Wire Fell Across Trolley Wire into the Street—Pedestrian Shocked by Contact—May Properly Join the Two Companies—Expert Testimony as to Insulator—Hearsay Evidence Competent for What Purpose—Evidence as to Leaks in Insulators at Other Points Incompetent.

1. Where telephone wires were strung across and but a few inches above a pull-over trolley wire, and there were no guard wires or insulators at that point, and one of the telephone wires fell across

1904].

Lorain County.

the trolley wire and thence into the street, and becoming charged caused a severe shock to a pedestrian, the negligence of each company co-operated with that of the other to bring about the injury, and a demurrer will not lie for misjoinder to a petition making them both defendants.

2. The issue having arisen whether the insulator in use on the pull-over wire between the point of contact and the trolley wires was a safe insulator, the testimony of an expert witness was properly heard on that point; and, if for no other reason, the objection thereto by the defendant street railway company on the ground that it was not bound to adopt the best insulator known, and that to compare the insulator in use with some other insulator was in effect making it appear that they should have adopted another, was without avail for the reason that the defendant had previously inquired of a witness whether the insulator in use was safe.
3. Questions to witnesses as to what changes had been made in the wires since the accident were not incompetent as tending to cause the jury to believe the company had by making such changes itself recognized that it had been negligent, where it was plain that the purpose of the questions was to fix the condition of things at the time of the accident, and not to show that changes had been made for the purpose of greater safety.
4. The admission of hearsay evidence is not erroneous where the purpose of such evidence is limited to fixing a date in the mind of the witness.
5. But evidence that other span wires on the same trolley system, and provided with the same kind of insulators, had been found heavily charged with electricity at or about the time of this accident, opened up a new field in that it called upon the other party to show whether electricity really did escape at other points and at other times, and was therefore erroneous.

MARVIN, J.; HALE, J., and WINCH, J., concur.

The case of The North Amherst Home Telephone Company and The Cleveland, Elyria & Western Railway Company against Clinton Jackson, an infant, is a proceeding in error brought here, seeking to reverse the judgment of the court of common pleas.

Each of the plaintiffs is a corporation. The North Amherst Home Telephone Company operates an exchange in the village of North Amherst, this county, and the railway company operates an electric railroad from North Amherst to Elyria, and so on through to Cleveland.

At Amherst the construction of the railway at its terminus is such that there is a Y, upon which cars are run for the purpose of getting them turned around and headed back over the line. For the purpose of this Y, the trolley over the north branch or track of this Y is drawn to and held in its position by a wire, called a pull-over (that is not the name by which it is called in the petition, but spoken of so many times in the evidence, that we have designated it as a pull-over wire) extending from the trolley to a green maple tree some considerable distance and northerly from the trolley. It is perhaps eighty-five feet from the trolley over to the tree. This pull-over wire is wrapped around the tree with dry boards between the wire and the tree in such wise that the wire does not come in contact with the tree itself. Between the trolley and the tree, and but a few feet from the trolley, there was placed what is known as a globe insulator for the purpose of cutting off the current, which would in the operation of the cars of the trolley company be carried along the trolley and out upon this pull-over.

About thirty inches above this pull-over wire and between the insulator and the tree, and crossing the line of the pull-over, the telephone company had strung four of its wires; there were no guards or insulators upon the wires of either company at the place of the crossing, and nothing to prevent the telephone wires from sagging down upon the pull-over wire except the tension of the wires. This crossing point was over one of the public streets of the village.

On the evening of July 4, 1901, there was a severe electric storm at Amherst, accompanied by heavy rain and violent wind. During the storm a barn in the village was set on fire, probably by lightning, and the plaintiff, a boy about eight years of age, with many others, went to the fire, and on returning therefrom, in walking along the public street or sidewalk, he walked against one of the telephone wires, which in some manner had been broken or burned off and was hanging over the pull-over wire of the railway company. This wire was charged with electricity to such an extent that the plaintiff was severely

1904.]

Lorain County.

shocked and burned by the electricity upon coming in contact with the wire.

To recover damages for this injury suit was brought by the defendant in error against both the telephone and the railway company, charging that his injury resulted from the carelessness and negligence of these companies. The case was tried to a jury in the court of common pleas, resulting in a verdict and judgment for the boy, the defendant in error, against both of these companies. The bill of exceptions before us contains the proceedings which took place in the trial, including all the evidence. Plaintiffs in error claim a reversal of the judgment for numerous reasons to be noticed.

First. A demurrer was filed by the railway company to the petition for misjoinder of defendants. This was properly overruled, for though each company had control of its own wires, yet the allegations of the petition are such as to show that the negligence of each company co-operated with that of the other to bring about the injury. Not only that, but there could be no prejudice to the railway company in the overruling of that demurrer, for the allegations of the petition showed a good case against that company. But in a case where the allegations are as they are here there was no misjoinder.

The Supreme Court of Alabama, in the case of *McKay & Roche v. Southern Bell Telephone & Telegraph Company et al*, reported in the 31st of the Lawyers' Reports Annotated, page 569, uses this language in the third clause of the syllabus:

"A telephone company and an electric railway company are jointly liable for negligence when both maintain their wires with knowledge of the danger caused by the want of guard wires between the trolley wire and a telephone wire insecurely suspended over it, and especially when they permit a broken telephone wire to remain suspended across the trolley wire."

It is urged further on in the trial, by an objection to the introduction of any evidence, that the petition fails to state a cause of action against anybody; that the charge in the petition, and the only charge of negligence, is that the companies had no guards or insulators at the place where the wires of the tele-

phone company passed over the line of the trolley of the railway company.

The language of the petition in that regard is this:

“On the 4th day of July, 1901, and for many months prior thereto, the defendants in their said business, knowingly, purposely and negligently suffered and permitted four or more of the wires of said telephone company to cross nearly at right angles to and within a few inches above a certain wire of said railway company at the northwest corner of Main and Milan streets in said village, the same being much traveled thoroughfares in the business center of said village, while all of said wires of both of said companies were heavily charged with electricity, and without any of said wires of either of said companies being properly insulated at said point of crossing as in the exercise of ordinary care by said defendants they should have been.”

Now with the liberal construction given to pleadings under the code, it seems clear to us that there is a charge of negligence here, more than simply negligence that there were no guards and no insulators at the point of crossing. “Without any of said wires of either of said companies being properly insulated by guards from coming in contact with one another at said point of crossing, as in the exercise of ordinary care by said defendants they should have been.” It seems to us that the fair reading of this is that: There was not the proper insulation of the wires of either company, and at the point of crossing there were not proper guards.

Counsel for the plaintiff clearly understood that such was the meaning, and we think it clear it meant that, and that therefore there is a charge of negligence in the want of proper insulation and the additional charge of negligence in the failure to guard the wires at the point of crossing.

Testimony was admitted (this is complained of, over the objection of the railway company), as to whether the insulation of the pull-over wire was a proper one. As has already been stated there was what is called the globe insulator in this pull-over wire a short distance from the trolley wire. The wires of the telephone company crossed the line of the pull-over wire at nearly right angles between this insulator and the tree. The first place where the objection is made to this kind of

1904.]

Lorain County.

evidence as to the insufficiency of this insulator in the pull-over wire, is on page 68 of the record. Bert Smith was a witness, and he was asked about the ball or globe insulator which was in the pull-over wire and quite a distance from where the wires crossed. Now it was said no complaint is made in the petition that there was any improper or insufficient insulation anywhere except at the place of crossing. But what has already been said on that point is all that need be said. It is proper to show under this petition that the insulator was not such as should have been used, the insulator at this place in the pull-over wire.

Again, it having been made to appear that the insulator used by the railway company was what is known as the ball insulator, and that other insulators for the same purpose were used by electric railway companies, quite a number of witnesses were asked as to the comparative merits of this ball insulator with other known insulators. Complaint is made that this kind of evidence should not have been permitted, because it is said the railway company were not bound to use the best insulators known, and that to compare their insulator with some other insulator was in effect to make it—it could not be admitted except for the purpose of making it—appear that the company should have used another, because there was another that was better, and they say they were not bound to have the best, but were only bound to have an approved insulator.

That objection would have more force, and possibly would be good, but for what had before that been elicited by questions put by counsel for the plaintiffs in error, the defendants below. W. J. Hiller was on the stand, placed there by the plaintiff below. He was the superintendent of the railway company. He had testified somewhat as to the construction of this railway. Upon examination he was asked by counsel for the railway company: "What do you say as to the globe insulator being a proper and safe insulator, July 4th, 1901?" That was objected to by the plaintiff below, the objection was overruled and the witness answered: "I think it is as good as they could have got in the market." Not content with that, counsel for

the plaintiff in error asked this question: "Were there any that were better?" And the witness answered: "Not to my knowledge." Now that having been brought out by questions asked by counsel for the railway company, it seems to us justified the defendant in error, the plaintiff below, to show that their superintendent was mistaken when he said that there were no better insulators on the market. Otherwise with what good effect the attorney might go to the jury and say: Why their witness, put on by themselves, says there were no better insulators in the market, overlooking the fact that he said it in answer to their question, and then might add very well in the argument, "and nobody pretends to deny it;" that was the very best insulator that could be got, and nobody is brought on to deny it. There was no such error in permitting the questions of the character under discussion to be answered as would justify a reversal of this case.

Bert Smith was a witness. He was asked by counsel for the defendant in error his opinion, and this appears on pages 79 and 80: "Whether the ball was a safe insulator." He was permitted to answer, he did not think it was safe; he said: "It was not safe as against lightning."

On page 85 he also made the statement "that the ball insulator would leak." It is complained that the ruling of the court in permitting this, which was permitted over the objection of the railway company, was allowing the witness to give an opinion on an ultimate matter. The witness was permitted to say that the insulator was not a safe insulator, give his opinion it was not a safe insulator, and that the insulator leaked.

Now already attention has been called to the evidence given by Hiller on page 8, when counsel for the railway company asked him: "What do you say as to the globe strain insulator being a proper and safe insulator, July 4th, 1901?" I think that they might very well after the testimony of Hiller, show by Bert Smith or any other competent man that it was not a safe insulator and that it would leak. Not only that, but our Supreme Court in the 61st of the O. S. Reports, at page

1904.]

Lorain County.

608, *Ohio and Indiana Torpedo Company v. Fishburn et al.*, discuss the question of the opinions of witnesses upon matters something like this. There an expert in the matter of drilling oil wells was upon the stand and he was asked the question: "Suppose the shooter of a well brings one hundred quarts of nitro-glycerine to said well, the nitro-glycerine had been placed in the shells, lowered in the well, the well logged in, the derrick boarded up, except the opening facing towards the engine and belt house, the said well being at a distance of from eighty to two hundred feet from the residence and buildings adjoining and surrounding it, located in a village of twelve to thirteen hundred people; the condition of the atmosphere such that when the gas is liberated from the well, it settles to the surface of the earth; would the hour of 7:30 on the seventh day of September in any year, when darkness had intervened so that fires and lights are lit in certain of such business and dwelling houses be in your opinion a proper time to shoot such well; that is to say, explode such torpedo therein?" And the answer is: "It is not a proper hour."

The court say:

"The objection urged is that this was error because the fact sought was a matter to be found by the jury. We do not think the admission of the evidence was error. The fact called for was evidentiary. It tended to prove one fact involved in the issue but was not the ultimate fact in issue. Nor was it a subject of common knowledge, or one of which the jury could as well judge as the witness."

The opinion then goes on to discuss the right of an expert to testify to it.

Now here the thing charged was that these people were negligent in the use of this insulator. This was one of the negligent acts complained of; we think it was proper to inquire of an expert whether that was a safe insulator, and in any event that it was not error after the other party had inquired of a witness whether it was a safe insulator.

On page 89 of the record we have the testimony of a witness by the name of Kitchon on the stand as an expert, and he was

asked: "Now from your practical experience of your life time, are you able (after he had given evidence tending to show he was familiar with electric street railroads), are you able, have you the means of knowing, from the practical workings of insulators, are you able to state which is the better insulator for a pull-over wire in July of 1901?" A. "I am." "You may answer the question." Then there was an objection and it was overruled. A. "For me I would put in the porcelain insulator or the wood." It seems there is an insulator known as the porcelain insulator and there is another insulator made of wood, and they are comparing those. "For me I would put in the porcelain insulator or the wood. Now if you want to know my reasons I will explain my reasons." No motion was made to take that testimony from the jury. The question was proper if what has already been said about comparing the different kinds of insulators one with another, if what has been said about that is correct, then the question was proper. If the answer was incompetent, no proper means to have it taken from the jury was exercised, and hence the court committed no error in that regard.

Frank Estinghausen was a witness in the case on the part of the plaintiff below, and as appears on page 103, he was asked to compare the globe insulator with the wood and other insulators, and that was objected to and overruled. And he was asked: "Do you know anything about that?" The question was proper, if what we have already said is all right. He said: "I have seen these, yes, sir, and seen them used a great deal; in speaking from a standpoint of working for my own safety on one of these or on the strap insulator or wood insulator, I would prefer the wood or strap insulator to this for several reasons."

The record reads: "Objected to by defendant; objection overruled; exception by defendant." The witness continues right on with his answer. "I say, with my own experience, I would prefer the strap insulator or wood insulator, for the reason here with a high current and working on the line; I am speaking strictly from my own experience in working on the line." He

1904.]

Lorain County.

goes on and bases it upon his own experience and what he would prefer, but no motion was made to take that from the jury. If the question was proper, as we have held it was, then the proper method of taking that from the jury was not adopted, and hence no error which would justify a reversal in that regard.

There was asked of more than one witness, one was Steele and I think of another witness, questions as to the condition of the wires at this place where the boy was injured, at the time of the trial. It is urged that error was committed, because the question of what changes had been made should not be permitted to go to the jury, as that might tend to induce the jury to think that the company itself recognized that it was negligent in the way that it had its wires, its arrangement at this place, and had made changes. At each of the places where this complaint is made an examination of the record shows that that is not the purpose at all, that that was not the tendency of it. The questions were asked as to the condition of things, and he said there are ten wires over there now. What the counsel was clearly trying to get at was, how many there were at the other time, not for the purpose of showing they made a change, but when the witness answered there were ten, counsel recognized it was not the same as it was before, and asked: "How was it at the time of this transaction?" There was no tendency to show the company had made any change for the purpose of making it safer, and therefore no prejudice could come to the company by having this question answered. That is true with each of the questions where a reference is made to a change.

Complaint is made as to some inquiry about the time Clark's buggy was overturned, and the witness stated he had heard of Clark's buggy being overturned, and it is urged that the plaintiff was getting in hearsay evidence. That was not the purpose of the evidence at all. He was asked, "You heard about Clark's buggy being overturned?" A. "Yes." Nobody claimed that was overturned by any electric storm, but in order to get at the time, because they thought they would be able to show when the buggy was overturned, they simply put the

question, "Do you remember when Clark's buggy was overturned?" There was no error in that.

Without stopping to go through with each of the objections made and exceptions taken to the rulings upon evidence, either permitting questions to be answered or excluding answers to questions, we will consider only one other witness, one other matter as to the rulings on evidence.

Ora Mowary was introduced by plaintiff below as a witness, and Mowary testified—he had been on the stand before—but he was introduced for a second time, as appears on page 278 and following, and he testified that he had been familiar with the lines of the telephone company, and that he was familiar with the lines of this railway company.

Then he was asked: "Have you come in contact with the trolley system of The C. E. & W. Railway Company?" That was objected to and the objection overruled, and no exception was there taken. A. "Yes, sir." Q. "I will ask you whether or not, in the line of your duties, it has become necessary for you to climb the poles to which their trolleys were attached?" A. "Yes, sir." Q. "I will ask you whether or not the span wires running from the trolleys to the poles on the C. E. & W. are supplied with insulators like the one marked Exhibit 1? What, if anything, have you discovered, Mr. Mowary, regarding live wires between these insulators and poles?" That was objected to and objection overruled and exception taken by defendant. Now following that, several questions are asked of Mr. Mowary of this sort, tending to show and designed to show that Mr. Mowary had observed the workings of the trolley system of this railway company, and that he had noticed that electricity escaped past these insulators, and the lightning.

The objection having been made, the court said this: "I would like to know what you expect to prove?" He asked this of plaintiff's counsel.

By Mr. Metcalf. "We expect and offer to show by the witness and other evidence, that a large number of the span-wires of the defendant railway company attached to its trolley wires along its line were, at about the time of the accident to the plaintiff, found alive and heavily charged with electricity be-

1904.]

Lorain County.

tween the poles to which the span-wires were attached and the globe insulators thereon near the trolley, and while these globe insulators to all appearances were in perfect condition."

By the court: "I will allow the testimony to go in under this statement, but before this trial ends, if I find I am wrong, I will endeavor to take it from the jury."

The court nowhere took that from the jury; he did permit that kind of evidence, not connected with this transaction, not near to this transaction. Necessarily that opened up, as we think, a field that would have called upon the other party to bring evidence to show—upon finding out from this man where it was—evidence to show whether electricity did escape at other points and other times. We think it was clearly error to admit this testimony, and that it was prejudicial to the defendant, and for this error the judgment must be reversed.

Very many other errors are complained of. The charge of the court is complained of on page 576. Certain language used by the court is said to be ambiguous, and other things in the charge, as already stated, are complained of; at least on page 576 the language is somewhat ambiguous, but we think what was afterwards said by the court in relation to the subject matter contained in that fully explained that, and that is equally true as to page 586, and we think that the charge as a whole was a fair charge, and no error was committed by the court in refusing to give requests made, and no error given in the charge as made, and the only error on which the judgment is reversed is on the admission of this testimony of Mowary, and for that the judgment is reversed and the case remanded to the court of common pleas.

E. G. Johnson, Hale C. Johnson and H. G. Redington, for plaintiffs in error.

Metcalfe & Cinniger, for defendant in error.

THE WRIT OF MANDAMUS.

[Circuit Court of Hamilton County.]

STATE EX REL FANGER, v. BOARD OF ELECTIONS.

Decided, January 5, 1903.

Mandamus—Will not Lie to Compel the Providing of Voting Machines by Board of Elections—Does Not Lie in Anticipation of the Omission of Official Duties.

1. A writ of mandamus to compel a board of elections to grant the petition of sixty-five per centum of the electors of a voting precinct for the providing of a voting machine for their precinct under the provisions of 95 O. L., 420, will not be issued, where it does not appear that there are funds on hand applicable to payment for such a machine, or that the board has been derelict in providing by proper levy a fund applicable to such purpose.
2. The rule that mandamus can not be granted in anticipation of an omission of duty, forbids the issuance of a writ to compel the purchase of a voting machine which will not be needed for three months, where it does not appear that it is necessary to purchase the machine at once in order to have it in readiness when needed.

SWING, J.; GIFFEN, J., and JELKE, J., concur.

This court, on November 4, ult., the day of the last election, issued an alternative writ of mandamus against the defendants, returnable on December 2, to show cause why they should not purchase a voting machine under and by virtue of the requirements of Section 14 of an act passed by the Legislature in May, 1902 (95 O. L., 420), for Precinct B of the Twenty-sixth ward of the city of Cincinnati. The petition alleges that sixty-five per centum of the electors have signed a petition praying for the adoption of a voting machine as required by the statute, and that the defendants refused to purchase the same.

The defendants answered, admitting that sixty-five per centum of the electors had filed the petition as alleged, and its refusal to purchase a machine, but denied all other allegations. No evidence was introduced as to the cost of a voting machine, but it was admitted in the argument that the cost was \$500.

No evidence was introduced by the relator showing that there was in the general revenue fund of the city, applicable to the purchase of a machine, sufficient funds for the purchase of the

1904.]

Hamilton County.

same. It did not further appear that said board were derelict in providing by proper levy a fund for the purchase of said machine, and as the board can not purchase a machine without funds which are applicable to the purchase of machines, the court should not attempt to compel the board to do an act which it is not in its power to do.

High Extraordinary Remedies, Section 14, says:

"It is a fundamental principle of the law of mandamus that the writ will never be granted in cases where, if issued, it would prove unavailing. And whenever it is apparent to the court that the object sought is impossible of attainment, either through want of power on the part of the persons against whom the extraordinary jurisdiction of the court is invoked, or for other sufficient causes, so that the granting of the writ must necessarily be fruitless, the court will refuse to interfere. So if it is apparent that the writ, if granted, can not be enforced by the court, relief will be withheld, since the courts are averse to exercising their extraordinary jurisdiction in cases where their authority can not be vindicated by the enforcement of process. Nor will mandamus be allowed unless the act or duty whose enforcement is sought is legally possible at the time."

The sixty-five per centum of the electors of said precinct presented their petition to said board on October 28, 1902, long after the time for which they might have provided a levy for the purpose of raising a fund sufficient to purchase said machine. It seems to us that this is all that should be said why the writ should be refused. The writ of mandamus is never granted except where the relator shows a clear legal right to have the writ issued, and it has not been shown here by the relator that the defendants have in the general revenue fund of said city funds which by law they are authorized to appropriate to the purchase of such machine. Neither has it been shown that said board neglected or refused to perform any duty resting on it to provide a proper fund in a proper way for the purchase of said machine.

There is still another reason why we think the writ should be refused at this time. The action was not brought to require the board to purchase a machine for the election held on November 4, ult. No application for the alternative writ was made to this court until the day of said election, and no election will

occur until the April election of 1903. If the board provides a voting machine by that time, more than three months hence, the relator will get all that he is entitled to. He is not beneficially interested in having the board purchase a voting machine at this particular time.

“Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act; and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show * * * a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed; nor does the law contemplate such a degree of diligence as the performance of a duty not yet due.” High Extraordinary Remedies, Section 12.

There is no legal duty now due the relator that the defendants must purchase a voting machine at this particular time. The time when there will be any use for said machine will be more than three months hence, and it is not shown that it is necessary to purchase such voting machine now in order to have it by the time needed. *Non constat* the defendants, if within their power to do so, may provide a voting machine as petitioned for by said electors of said precinct for the coming election in April. And it would only be reasonable to assume that the Legislature intended that in the purchase of machines, the board should make all necessary investigations as to the merits of the different machines and make proper agreements as to terms of sale, and these might very well require some time.

For these reasons the writ must be refused. Having come to this conclusion for the reasons stated, we do not think it proper to enter into a discussion of the other questions presented to us on the argument of the case, for what we would say would be *obiter dictum*.

Geo. B. Okey, Cohen & Mack and Chas. L. Swain, for relator.
Corporation Counsel, for defendants.

LIEN ON WATER-CRAFT.

[Circuit Court of Cuyahoga County.]

ROBERT A. SHAILER v. MARK H. HANLON.

Decided, February 29, 1904.

Water-Craft—State Courts have Jurisdiction over—Where the Constitutionality of a State Statute is Involved—May Direct to Whom Balance of Purchase Money shall be Paid—Ohio Statute Provides a Lien for Supplies—Coal Furnished in Bulk for the Vessel and Other Purposes.

1. A state court has jurisdiction to construe a statute of the state relating to liens on water-craft, and where the balance of purchase money for the boat is brought into court by the party owning it, the court has the jurisdiction to direct to whom it shall be paid.
2. It is not necessary under the Ohio statute (Section 5880) for one furnishing supplies to a vessel with the understanding on the part of both the vendor and the vendee that such supplies were furnished on the credit of the boat, and unless the evidence shows that the supplies were furnished upon the credit of the owner or some other person, one from whom such supplies were obtained is entitled to a lien.
3. Where coal is furnished to a vessel in bulk, a part to be used on the vessel and a part to be unloaded at a designated place for a known use, a lien will attach to the vessel for the coal used in its navigation.

MARVIN, J.; HALE, J., and WINCH, J., concur.

Error to court of common pleas.

The original action was brought by Robert A. Shailer against the Standard Contracting Company, a corporation, to recover a balance due upon the purchase price of the steamer George T. Burroughs, which was bought by the defendant from the plaintiff. By the contract of sale the plaintiff guaranteed said steamer to be free of all liens. The amount remaining unpaid upon the purchase price is \$950. The defendant in error, Mark H. Hanlon, was brought into the case by interpleader, the original defendant, by one of its officers, filing the proper affidavit that said Hanlon claimed a lien upon the steamer, and said Hanlon was thereupon made a party in the case and filed

his answer, setting up that he had a lien and the nature thereof. The steamer was used on Lake Erie in carrying supplies from the dock at the city of Cleveland, Ohio, to what is known as the "crib," some five miles out in the lake from the dock. The lien claimed by Hanlon grows out of the following state of facts:

Hanlon was a coal-dealer in the city of Cleveland, and for a series of years prior to the year 1901 had furnished coal which was taken upon this steamer and used in part for the navigation of the vessel, and in part was unloaded at the "crib" and used there. Up to the year 1901 the coal so delivered by Hanlon to the steamer was paid for by the owner or charterer of the steamer. The steamer, during the greater part of that time, was owned by the Shailer & Schniglaui Company, but on or about the 20th of October, 1901, the boat was sold by that company to the plaintiff. After such sale the boat was chartered by said Shailer & Schniglaui Company from the plaintiff, and was used in the same way as it had theretofore been used. The owner of the boat, or the agent, made inquiry of Hanlon as to the price at which he would furnish the price at \$1.95 per ton. Beyond this, no contract was ever entered into between the parties, except that from time to time, during the season of 1901, the master of the boat, and sometimes some other representative of the parties operating the boat, ordered coal to be delivered to the boat by Hanlon, and this was accordingly done. The coal furnished by Hanlon to the boat during the season of 1901 amounted to about 1,200 tons. At the time that Hanlon first began furnishing coal to this boat it was charged by him directly to the steamer, but during the season of 1901 it was charged to the Shailer & Schniglaui Company, per Steamer George T. Burroughs. Of the coal thus delivered to the boat by Hanlon 225 tons were used for the purpose of navigating the boat. The balance was unloaded at the "crib" for other purposes. No part of the coal furnished for the season of 1901 was paid for. No distinction or separation was made at the time the coal was delivered between that which was to be used for the navigation of the boat

and that which was to be delivered at the "crib." The coal was simply delivered in bulk, and from that bulk such part was used for this navigation as was necessary. Hanlon claims a lien for the coal used in navigating the boat, under Section 5880 of the Revised Statutes of Ohio, which reads:

"Any steamer, boat or other water-craft navigating the waters within or bordering upon this state shall be liable, and such liability shall be a lien thereon for all debts contracted on account thereof by the master, owner, steward, consignee, or other agent for materials, supplies or labor in the building, repairing, furnishing or equipping of the same." * * *

The original defendant comes into court and admits the indebtedness on account of the purchase-price of the boat, and tenders payment to the party who shall be found to be entitled to such payment. The court of common pleas held that Hanlon had a lien for the 225 tons used in navigating the boat, at the price of \$1.95 per ton, as fixed as the value of the coal delivered, and ordered that the value of this amount at this price should be paid to Hanlon out of the money due from the original defendants.

On the part of the plaintiff in error it is claimed, first, that the court was without jurisdiction to determine this lien and direct the payment of the money to Hanlon, and, further, that even if the court had jurisdiction, the facts do not entitle Hanlon to a lien.

As to the jurisdiction. It is settled that the liens upon water-craft provided for in the state statutes can not be made the basis of an action in the state courts, but that the federal courts, having admiralty jurisdiction, have the exclusive jurisdiction in actions brought to enforce the lien. But that is not the present case. The boat has been sold. The money due upon the purchase price is brought into the state court. A construction of a statute of the state becomes necessary. We hold that the state court has the jurisdiction to construe the statute and that the money, being brought to the court by the party owing it, when the court has construed the statute it has the jurisdiction to direct to whom it shall be paid. Otherwise we should have this situation: That Hanlon was called upon to plead in this case.

Being so called upon, he must either set up his claim or ignore the court and commence an action in the federal court. If he had failed to assert his rights in the state court, the court might have proceeded to direct the money to be paid to the plaintiff, even though a part of it were due to Hanlon, and the original defendant, being under the jurisdiction of the state court, would be bound to obey the order of the court, and then when Hanlon brought his suit in the federal court the original defendant might be required to pay again the amount of Hanlon's lien, if it should be determined that he had a lien.

Though this question is not free from doubt, it seems to us that the better reasoning is that the court which has the parties before it and the money under its control, and having jurisdiction for determining the statute, should have the authority to direct to whom such money should be paid. We hold, therefore, that the court of common pleas had the jurisdiction to determine the rights of the parties in this case.

There remains the question of whether Hanlon, under the facts, was entitled to a lien. Statutes similar to our own are in force in most, if not all, of the states. They were enacted because, under the admiralty laws, liens were given only for supplies furnished to a vessel in a foreign port, but these statutes provide for many things not provided for by the admiralty laws, and whether or not it would be necessary, in order to hold a lien under admiralty law, for one furnishing supplies to a vessel to show affirmatively that the contract for supplies was made with the understanding on the part of both the vendor and vendee that such supplies were furnished on the credit of the boat, we hold that it is not necessary under our statute.

It is said, in the case of *The Lulu*, decided by the Supreme Court of the United States, 10 Wallace, 192:

“Experience shows that ships and vessels employed in commerce and navigation often need repairs and supplies in course of a voyage, when the owners of the same are absent, and at times and places when and where the master may be without funds, and may find it impracticable to communicate seasonably with the owners of the vessel upon the subject. Contracts for repairs and supplies, under such circumstances, may be made by the master to enable the vessel to proceed on her voyage, and

if the repairs and supplies were necessary for that purpose, and were made and furnished to a foreign vessel or to a vessel of the United States in a port other than a port of the state where the vessel belongs, the *prima facie* presumption is that the repairs and supplies were made and furnished on the credit of the vessel unless the contrary appears from the evidence in the case."

The syllabus in the same case reads:

" * * * in the case of a lien asserted against a vessel supplied or repaired in a foreign port, necessity for credit must be presumed where it appears that the repairs and supplies for which a lien is set up, were ordered by the master, and that they were necessary for the ship when lying in port, or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew these facts, or one of them, or that such facts and circumstances were known to them as were sufficient to put them on inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel."

We hold that, under our statute providing for a lien for supplies furnished "on account" of such vessel is sufficient to give the person furnishing such supplies a lien, unless the evidence shows such supplies were furnished upon the credit of the owner, charterer, or some other person, and not upon the credit of the vessel.

Coming, then, to the question of whether because of the fact that the coal for which this lien is claimed was furnished in bulk with other coal, no lien could be upheld, we hold that to the extent that this coal was used for the navigation of the vessel Hanlon was entitled to his lien. We think this holding is justified by the holding of the Circuit Court of the United States for the First Circuit, in the case of *The Kiersage*, 2 Curtis Rep., 421. In that case, a statute of the state of Maine was being considered. The facts were that certain parties furnished materials for the building of two vessels of the same pattern and tonnage, in the same way, in the same yard, at the same time. A claim was made that the parties furnishing these materials were entitled to a lien on each vessel for the materials furnished for both, and the court say upon this question, at page 423:

“The next question which has been argued in this appeal arose out of the following facts: The builders of this vessel were building another of the same tonnage and model in the same yard, at the same time while this one was constructing. The libellants furnished materials for the two vessels without distinguishing between them.”

And on page 425, this language is used in the opinion:

“At the same time, I think that where materials are furnished for two specific vessels though the original contract does not appropriate them specifically to either, yet when they are afterwards appropriated, they may properly be considered as furnished for that vessel in the construction of which they are used.”

As bearing upon the questions arising in this case, attention is called to the case of *The H. B. Foster*, 3 Ware, 165.

Entertaining the views expressed in this opinion, the judgment of the court of common pleas is affirmed.

Goulder, Holding & Masten, for plaintiff in error.

Russell & Eichelberger, for defendant in error.

ATTORNEY AND CLIENT.

[Circuit Court of Hamilton County.]

SPANGENBERG V. ZUMSTEIN.

Decided, January 15, 1903.

Judgment—Assignment of to Attorney by Client for Professional Services—Agency.

One who assigns all right, title or interest in a judgment to an attorney in consideration of professional services theretofore rendered, the said attorney to account to the assignor for one-half the amount realized on the judgment, does not make the attorney an agent for the collection of the judgment, but invests him with full title thereto, and the attorney has the right to prosecute an action in his own name against the judgment debtor.

SWING, P. J.; GIFFEN, J., and JELKE, J., concur.

This was an action in the court of common pleas by Spangenberg against Zumstein on a bond given by said Zumstein

1904. [

Hamilton County.

to one Kate Dilg to perfect an appeal from the judgment of Philip Winkler, a justice of the peace in this county, in an action pending before him.

This action in the court of common pleas was prosecuted in the name of Spangenberg, who claimed to be the owner of the judgment obtained by Kate Dilg in said action on appeal from said justice.

The only evidence in the case was that of Spangenberg, who testified that the judgment had been assigned to him by Kate Dilg, and the assignment was in the following words:

"Kate Dilg v. Christ Dilg. For value received I hereby and by these presents assign, transfer and set over to Ed. M. Spangenberg all my right, title and interest in and to the judgment herein.

"KATE DILG.

"Cincinnati, July 5, 1901."

On cross-examination Spangenberg testified as follows:

"Q. Is it not a fact that at the time of the assignment you agreed to pay one-half of any judgment you might recover to Kate Dilg?

"A. Yes, sir.

"Q. Did you pay any money as a consideration for the assignment of the judgment?

"A. The consideration for the assignment was professional services rendered by me to her, prior to the assignment."

This was all the evidence offered by either party; on it the court rendered judgment for the defendant and dismissed plaintiff's petition.

It is urged before us in support of the judgment that the evidence shows that Spangenberg is not the owner of the judgment and had no right to prosecute an action in his own name, as he is not the real party in interest as is required by Section 4993, Revised Statutes.

Was Spangenberg the owner of the judgment? We see no reason to question his absolute ownership of it. It was a chose in action owned by Mrs. Dilg, which she had a right to assign, and she did assign it to Spangenberg, and for a consideration

(which was for services rendered to her in the past by Spangenberg). The fact that Spangenberg was to pay over to Mrs. Dilg one-half of whatever he might recover on it did not leave in Mrs. Dilg any right as against Zumstein, that she had transferred to Spangenberg, and instead of her right against Zumstein, she had substituted one against Spangenberg. It is true that it arose out of the right that she had originally against Zumstein, but it was not the same right. The intention to us seems clear that she intended to vest in Spangenberg the ownership of the judgment and not constitute him her agent for the collection of it, of which he was to receive half when collected.

This case we think clearly distinguishable from the case of *Brown v. Ginn*, 66 Ohio St., 316, where the court found the party was the mere agent of the assignors whose claims had been assigned to the assignee for the purpose of collecting the same, and the only consideration moving between the parties in the transaction was to be the services to be thereafter rendered by the assignee in the prosecution and collection of the claims, and where the assignee by the terms of the assignment was to pay all costs of suit and pay over to the assignors the proceeds of the recovery in the judgments after deducting certain amounts due him for services rendered in recovering the same. The court held in this case that the assignee was the mere agent of the assignors, and not the owner of the claims, and that the transaction was champertous, but all the elements in that case seem to us to be lacking here.

Judgment reversed.

J. J. Gasser, for plaintiff in error.

Shay & Cogan, contra.

QUESTIONS ON TRIAL FOR HOMICIDE.

[Circuit Court of Wyandot County.]

MARSH LINDSAY V. STATE OF OHIO.

Decided, April Term, 1902.

Criminal Law—Irregularities in the Impanneling of Grand and Petit Juries—Indictment for Murder in an Attempt to Rob—Premeditation not an Essential Element—Plea in Abatement—Waiver of Constitutional Privileges—Change of Venue—Examination of Jurors on their Voir Dire—Charge of Court—Degree of Crime Fixed by the Jury.

1. An irregularity in the impanneling of a grand jury, such as the swearing of and instruction of the jury before the return of the *venire facias*, is not ground for quashing an indictment, or for a plea in abatement, but must be taken advantage of, if at all, by challenge for cause.
2. Premeditation is not an essential element of an indictment for murder in the first degree, when the homicide was committed in an attempt to rob; and it is not necessary, where the indictment charges that the act was done by several persons jointly, that it should set out which one of the defendants actually did the killing.
3. An inquest before a grand jury is not a trial, and a plea in abatement in which it is alleged that the defendant was compelled to attend before the grand jury and to be sworn and give testimony without the advice of counsel, and to dress himself in disguise as the persons were dressed who committed the crime, and when thus dressed to exhibit himself before the grand jury, is bad for uncertainty and insufficiency because it does not allege that he claimed his constitutional privilege of refusing to answer or to dress himself in disguise.
4. The action of the trial court on motion for a change of venue can not be reviewed on error unless it should clearly appear that there was an abuse of discretion in overruling the motion.
5. The panel of a petit jury in a capital case when containing less than thirty-six names, may be filled by special venire.
6. Where in the examination of a petit juror on his *voir dire*, the juror states that he has formed an opinion or prejudice which is against the defendant, but he thinks he can render a fair and impartial verdict according to the law and the evidence, the acceptance of such juror by the court is a finding that the court

* Affirmed by the Supreme Court, 69 Ohio State, 215

was of the opinion that the juror would render a fair and impartial verdict, and the refusal of the defendant's challenge for cause was not error.

7. The charge of the court in a homicide case should leave the jury free to render such verdict and to fix such a degree of crime as their judgment and conscience dictate.

DOUGLASS, J.; VOORHEES, J., and DONAHUE, J., of the fifth circuit sitting in the third circuit; opinion by VOORHEES, J.

Plaintiff in error was indicted, together with four others, at the April Term of the Court of Common Pleas of Wyandot County, Ohio, on July 27, 1901, for the murder of William C. Johnson, on September 11, 1900. At said term plaintiff in error was tried and convicted of murder in the second degree, and sentenced to the penitentiary for life.

Error is prosecuted to this court, and numerous grounds are assigned for the reversal of the judgment. Among the errors assigned are:

1. Irregularity in selecting a special grand jury.
2. That the indictment is defective in form, viz.: That it does not define and describe a crime; it does not aver deliberate and premeditated malice; that it does not state which of the defendants held in his hands and discharged the pistol, or committed the supposed crime; the indictment was not returned and presented to the court as required by law; the grand jury, if sworn and charged at all, were sworn and charged before the return of the *venire facias*; that the grand jury was not sworn and charged until after they had entered upon said investigation and found said bill.
3. That said jury only investigated this case charged in the indictment against this defendant and his co-defendants, and that while said grand jury was investigating said case, and while so doing, caused a subpoena to be issued for this defendant, plaintiff in error, and required him to be sworn in open court, and to give testimony before said grand jury concerning this case, and while the conduct of this defendant was being investigated, and required him to give testimony concerning the charge against him in violation of his constitutional rights.

1904.]

Wyandot County.

4. In sustaining the demurrer of the state to defendant's plea in abatement.

5. In overruling defendant's motion for a change of venue.

6. Errors in selecting and impaneling the petit jury, and in overruling objections of defendant to jurors for cause, and in compelling defendant to accept a juror challenged for cause after having exhausted the peremptory challenges under the statute.

7. Error in the charge of the court as given, and in refusing to charge as requested.

8. Misconduct of prosecuting attorney in the conduct of the case and in his closing argument to jury.

9. That the verdict of the jury is not supported by sufficient evidence and is against the weight of the evidence.

We will consider the errors in the order named:

1. As to the impaneling of the grand jury.

The errors complained of as to impaneling the grand jury are irregularities only, and not objections to any of the panel as to their qualifications. Sections 5162 and 5167, Revised Statutes, provide for the selection, drawing and summoning of grand and petit juries. Mere irregularities in selecting and drawing grand juries, which do not relate to or affect their qualifications as such, must be taken advantage of, if at all, by challenge for cause, and can not be made grounds to quash the indictment or be pleaded in abatement. *Huling v. State*, 17 Ohio St., 583; *Blair v. State*, 5 C. C., 496; affirmed by Supreme Court, 25 Bull., 388.

Technical defects in obtaining and impaneling a grand jury, which do not affect the competency of the persons to act, can not properly be made the basis of a motion to quash the indictment or plea in abatement, but must, by express statutory provision, be availed of, if at all, by challenge before the jury is impaneled and sworn. *Blaney v. State*, 17 C. C., 486.

Section 5171, Revised Statutes, provides for the filing of the panel of a grand jury, and is not affected by Section 5167, Revised Statutes (*Julian v. State*, 46 Ohio St., 511). Said Section 5171, Revised Statutes, is not repealed by the act of 1894 and 1895. *Stahl v. State*, 11 C. C., 23-33.

A special grand jury, assembled to consider one case, is not thereby prevented from investigating any matter which involves a violation of the criminal law of the state. *Franklin Co. (Comrs.)*, *In re*, 7 N. P., 450.

Section 5171, Revised Statutes, provides that:

"If, by reason of challenge, or for other cause, there be not present a sufficient number of jurors, summoned as aforesaid, to make up the panel, whether of the grand or petit jury, or if the array be challenged and set aside, the sheriff shall summon a sufficient number of talesmen to make up the deficiency; or, if there be such deficiency in the grand jury, the court may issue a special venire to the sheriff, commanding him to summon the persons therein named to attend forthwith as grand jurors; and at the close of each term of the court all persons who have served on either jury for such term, together with those who are found permanently disabled, disqualified or not liable to serve, shall be discharged."

Section 7 of the jury act of 1894 (91 O. L., 146), repealing certain named sections of the revised statutes, relating to the drawing of grand juries, did not, by implication, repeal other sections not therein named, relating to the summoning of talesmen for the grand jury. *Stahl v. State*, *supra*.

"Section 5167, Revised Statutes, as amended February 23, 1889 (86 O. L., 51), relating to the drawing of grand and petit juries, * * * gives a rule for the filling of the panel for a petit jury, but does not relate to the filling of the panel for a grand jury. The latter is governed, as theretofore, by Section 5171, Revised Statutes." *Julian v. State*, *supra*.

This section (5171) is not repealed by the act of 1894-1895. *Stahl v. State*, *supra*.

At the January Term, 1901, of said court, the record shows that fifteen persons were summoned by the sheriff from among the bystanders to appear on March 1, 1901, as grand jurors; and the court appointed Amos Bixby foreman, and he and his fellows took the oath as grand jurors as required by law, and on March 5, 1901, said grand jurors presented their certain bill of indictment endorsed by Amos Bixby, foreman of the grand jury, "a true bill," and against the following named persons:

1904.]

Wyandot County.

Charles Foster, Willis Miller, Marsh Lindsey, Lock Foster, George Ury, murder in the first degree, in attempting to rob William C. Johnson.

It is contended by plaintiff in error that the grand jury was sworn and charged before the return of the *venire facias*. The record shows that the jurors were called and took the oath required by law, and were instructed by the court in relation to their duties. Even if this were done before the return of the *venire*, it would be an irregularity only, and would not be any reason or ground for quashing the indictment. *Blair v. State*, and *Julian v. State, supra*. Therefore, the motion to quash was properly overruled, so far as irregularities in selecting the grand jury are concerned.

2. Is the indictment defective in form?

The indictment in this case is predicated upon Section 6808, Revised Statutes, and charges the defendant, with four others named, with killing one William C. Johnson in attempting to perpetrate a robbery. The persons named in the indictment are all charged as principals. The indictment does not charge that the act of killing was with deliberation and premeditation, or with premeditated malice. But the charge is, that the act was done, with the intent unlawfully and purposely to kill and murder, whilst engaged in an attempt to perpetrate a robbery in and upon said William C. Johnson.

In an indictment for murder in the first degree, when the act was done in an attempt to rob, premeditation is not an essential element. Section 6808, Revised Statutes, provides that "Whoever purposely, and either of deliberate or premeditated malice, or by means of poison, or in perpetrating, or attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree."

In the case at bar, the intentional killing of Johnson by the defendant and others, while attempting to perpetrate a robbery, is a charge under the statute of the crime of murder in the first degree. Premeditation in such a case is not essential *Stephens v. State*, 42 Ohio St., 150; *Robbins v. State*, 8 Ohio St., 131; *Jones v. State*, 14 C. C., 35.

It is alleged in the motion to quash, and also in the plea in abatement, that the act and crime complained of were committed by all five defendants, and that there is no allegation that the defendant committed it. They were all indicted together, and charged with the same offense. It is not necessary for the indictment in such case to set out which one of the defendants fired the fatal shot. It was proper and sufficient to allege that all five committed the unlawful act. If the proof on trial showed that the five were together, and that only one of them did the act, and the others were present aiding and abetting him, they should be charged as principals. We think the indictment is sufficient in form, and charges a crime of murder in the first degree, and it is not indefinite by reason of failing to allege which one of the five charged held the pistol or fired the fatal shot.

Third and fourth grounds of error are considered together. It is alleged in the motion to quash, and also in the plea in abatement, that the grand jury, investigating the case of the defendant (plaintiff in error), caused a subpoena to be issued for the defendant, requiring him to be sworn in open court, and required him to, and he did, give testimony concerning said case, and the conduct of the defendant in relation to said crime was being investigated, and the state required defendant to give testimony concerning the charge against him. When he so gave his testimony he did not know that any case against him was being investigated, and that he was not permitted to have counsel to obtain advice upon said matters, and was required to and did take an oath, as a witness, against his will, and was required to appear before said grand jury and to give testimony concerning said case; that he was, by the prosecuting attorney and sheriff, required, against his will, to dress himself as the person or persons who committed the crime for which he stands charged, were dressed, or appeared to be dressed, at the time the crime was committed; and while so dressed against his will, he was required to walk, talk and exhibit himself in the presence of the prosecuting witness and other witnesses for the state, to enable them to testify before the grand jury as to whether or

1904.]

Wyandot County.

not the defendant was the person who committed the crime with which he stands charged, and that said witnesses, after having so seen this defendant disguised as aforesaid, appeared before the grand jury and gave testimony against him as to his identity.

It is contended that in this, the constitutional rights of the plaintiff in error were violated by his being so subpoenaed and appearing before the grand jury, and in being sworn and in testifying upon any matter connected with the crime for which he was indicted. The plaintiff in error does not aver in his plea in abatement that he claimed his constitutional privilege to refuse to answer any questions or interrogatories, but his allegation is that he was required and compelled to and did make answers to all the questions put to him. This is a conclusion from the facts which he was required to set forth in his plea, and not the conclusions themselves. He further contends that he was denied the assistance of counsel. The legal sufficiency of this plea in abatement is raised by demurrer by the state to the plea. The demurrer was sustained and the defendant excepted. This raises an important question as to whether or not a constitutional right of the defendant was violated in this regard. At the time he so testified he was not on trial. It is true Section 10, Article I, Ohio Constitution, provides: "Nor shall any person be compelled in any criminal case to be a witness against himself, or be twice put in jeopardy for the same offense."

The question in this case is, should an indictment be quashed on motion or by plea in abatement merely because the accused was one of several witnesses summoned and examined by the grand jury in investigating a crime for which he was afterwards with others indicted? If any person summoned to so appear and testify, fails to claim his privilege, but answers questions incriminating or implicating himself, the mere fact that he has so testified is not enough to invalidate an indictment against him, though based in part upon his testimony. Nor will the fact that a suspected person has been required to give evidence in another matter be sufficient to set aside an indictment on the ground that he is compelled to testify against him-

self, unless it affirmatively appears that he was indicted wholly or in part on his own admission. *Boone v. People*, 36 N. E. Rep., 99 (148 Ill., 440); *Mackin v. People*, 3 N. E. Rep., 222 (115 Ill., 312).

In *People v. Lauder*, 46 N. E. Rep., 956 (82 Mich., 109), it was held: That the constitutional rights of the respondent were not violated by his being subpoenaed and appearing before the grand jury, and being sworn, nor in testifying upon any matter then under investigation that did not criminate him, and, if he testified without objection, he was deemed to have done so voluntarily. It was further held in the same case that the respondent, not having averred in his plea that he claimed his privilege or refused to answer any interrogatories, but that he was required and compelled to, and did make answer to the questions put to him, was a conclusion from the facts, which he was required to set forth.

It will be observed upon an inspection of the defendant's plea in abatement, that he does not allege that he claimed his privilege or refused to answer the interrogatories, or that he refused to dress himself in disguise, but his allegations are, that he was required and compelled to do so. This is pleading a conclusion instead of the facts, which he should have set up in his plea. The court, in *People v. Lauder*, *supra*, page 957, on the sufficiency of a plea in abatement, uses this language:

"Second, because his (defendant's) constitutional privilege was invaded in compelling him to testify against himself. In determining the sufficiency of this plea, it should be borne in mind that the finding of the grand jury was not a trial upon the merits, but a presentment of charges or mere accusation upon which a trial may be had. The plea does not assail the form or the substance of the indictment, but sets up the misconduct of the grand jury in proceedings before them, anterior to the finding of the indictment. It is a dilatory plea, which, in the unbroken practice of the courts, is for that reason looked upon with disfavor, and has always been subjected to technical rules. When such dilatory pleas are resorted to, we must apply to them those long-established canons of construction to test their sufficiency for the purpose of abating the prosecution, which the experience of courts through a long series of years has found necessary to protect suitors from unnecessary delay and

1904.]

Wyandot County.

expense. Those rules are necessarily strict and technical, and a party interposing such dilatory plea invites the most rigid scrutiny of its sufficiency under the established rules of pleading.”

The defendant, plaintiff in error, does not claim in his plea that he asserted his privilege, or refused to answer any interrogatory, or refused to be dressed in disguise. He avers that he was required and compelled to, and did make answer to the questions put to him; that he was compelled to dress, walk and talk and exhibit himself in the presence of the prosecuting witness and other witnesses for the state, to enable them to testify before the grand jury as to his identity with the person who committed the crime with which he stands charged. He avers that he was required and compelled to, and did do these things. This is a conclusion from the facts. The rules of pleading in abatement require him to set forth the facts, and not his conclusions. The same is true with the averment of the plea with reference to his being compelled to take his oath. The real complaint made by the plea is, that he was subpoenaed to appear before the grand jury, and he appeared in obedience thereto; that he was sworn in open court, was interrogated and answered questions; that he was dressed in disguise, etc. He states that all this was done without having the aid and advice of counsel, etc. As he was not upon trial for any offense, no exceptions can be taken to his not having the assistance of counsel; and as he made no objection to testifying, dressing up, walking or talking, on account of privilege, these acts and facts furnish no ground for quashing the indictment.

It has been held in the following cases, that a prisoner, when on trial, may be compelled to furnish personal evidence of his identity. *State v. Graham*, 74 N. C., 646 (21 Am. Rep., 493); *Walker v. State*, 7 Tex. Ct. App., 245 (32 Am. Rep., 595); *State v. Ah Chuey*, 14 Nev., 79 (33 Am. Rep., 530).

In the last cited case the defendant was held compellable to expose his arm to determine whether there were tatoo marks on it, as described by witnesses, and the holding was sustained by a majority of the court.

In *State v. Garrett*, 71 N. C., 85 (17 Am. Rep., 1), the prisoner was held properly compelled to exhibit her hand, which she pretended to have burned.

In *State v. Prudhome*, 25 La. Ann., 523, the court said:

“The tracks of the murderer were found near the scene of the murder, and to enable the witness who saw the tracks to state how they corresponded in size with the feet of the prisoner, he was forced to take his feet from under a chair where he had put them. This the prisoner’s counsel called forcing him to give evidence against himself. Mere statement of the fact shows how utterly untenable the objection is. The witness was required to look at the feet of the prisoner in order to testify to facts which might enable the jury to connect the prisoner with the perpetrator of the crime, and we are unable to perceive how any constitutional right of the prisoner was infringed by compelling him to place his feet where they could be seen by the witness.

“The accused may, when arrested, be subjected to a compulsory physical examination to ascertain his identity. A witness may always testify to the physical condition of the prisoner, when his condition is relevant. He may state what marks he saw on the prisoner’s body, whether he was physically deformed in any way, and may describe his general personal appearance so far as he observed it. And this is the rule even where the clothing of the prisoner is forcibly removed without his consent by the police officers who arrested him, or who have him in charge, and his nude body is examined for purposes of identification. Where the condition of the prisoner’s hand, at the date of the crime, is relevant, it has been held that he may be required to exhibit it devoid of covering; and a witness who saw it then exhibited, at the coroner’s inquest, may testify to its condition, though the exhibition was obtained by intimidation.” *State v. Garrett*, 71 N. C., 85, 87 (17 Am. Rep., 1).

The cases just reviewed are cases where the accused party was upon trial in the trial court, and we take it that if the constitutional rights of a prisoner were not violated in these cases, much stronger reasons favor the holding that the prisoner’s constitutional rights were not violated by his being subpoenaed and appearing before the grand jury and being sworn, and in testifying upon any matter that did not criminate him, and especially when he did not claim his privilege or refuse to

1904.]

Wyandot County.

answer the interrogatories put to him. At the time he so testified that he was not on trial. An inquest before a grand jury is not a trial. The plea in abatement sets up the facts embraced in grounds one and two, and as we have considered them, it is not necessary to consume time to show that there was no error in sustaining the demurrer to his plea.

5. Motion for change of venue.

This motion is attempted to be supported by affidavits that a fair trial for defendant could not be had in this county on account of prejudice. Counter affidavits were submitted by the state. On examination of the evidence submitted, we are of the opinion the court did not err in overruling the motion. Such motions are addressed to the sound discretion of the court, and unless there has been an abuse of discretion, there was no error in overruling the motion. *Hotelling v. State*, 3 C. C., 630.

6. Error is assigned in selecting and impanneling the petit jury that tried the defendant, in this: But thirty-five of the jurors reported under first venire. The panel was filled by special venire. It is contended that this was irregular and illegal.

Section 7267, Revised Statutes, provides for the jury in capital cases. Section 7268, Revised Statutes, provides for additional jurors. Upon the trial of a capital offense, the first thirty-six persons summoned who answer to their names, and who are without the disqualifications named in Section 7268, Revised Statutes, constitute the panel from which the jury for the trial of the cause is to be chosen, but if so many of this number be set aside or challenged as would not leave twelve persons competent to serve, the vacancy so caused must be filled in the manner directed in Section 7275, Revised Statutes. The court may order additional names to be drawn (Section 7269, Revised Statutes). Jurors summoned as provided by Sections 7267, 7268 and 7269, Revised Statutes, or such of them as are not set aside on challenge, together with so many of the bystanders having the qualifications aforesaid as will make up the number of twelve, as may not be set aside on challenge, shall be a lawful jury, etc.; provided that either party may demand and have a special venire to fill the panel as provided in Sec-

tion 5173, Revised Statutes (Section 7275, Revised Statutes). Peremptory challenges by defendant in a capital case shall be sixteen (Section 7272, Revised Statutes).

It is urged that the trial judge erred in refusing to sustain the challenge for cause interposed by the defendant to each of the persons called as jurors, to-wit: Arthur Bigman, George Spoon, Lewis Cross, and who, after the overruling of the challenge for cause, were peremptorily challenged by the defendant. After the defendant had exhausted his peremptory challenge, he asked to challenge the juror, Parker, the last juror called, peremptorily, and the challenge was overruled.

It will be impracticable to review all the testimony bearing upon the qualifications of these three jurors. In selecting Lewis Cross, perhaps the question can be tested as well as by either or all of the others. Cross said in answer to questions propounded by counsel for defendant:

"Q. From all you have talked and read about the other trials (presumably the other trials mentioned were those of the co-defendants of plaintiff in error), have you formed any opinion as to the guilt or innocence of the defendant. A. I think I did have an opinion.

"Q. Is that opinion with you still? A. Yes, sir.

"Q. Would it require any testimony to remove the opinion you have now formed? A. Yes, I think it would.

"Q. And the opinion that you now have is against the defendant? A. Yes, it would be against him.

"Q. It would take more testimony to remove that opinion, would it not? A. It would take some testimony; yes.

"Q. When you start into the investigation of this case, you would not start exactly fair and even between the state and the defendant, would you? A. I think I could start about even with this man in this case.

"Q. You say it would take testimony to remove the opinion you now have? A. Well, of course, it would.

"Q. Your opinion against the defendant is, that he was possibly one of the gang? A. Yes, sir.

"Q. And it would take more testimony to remove that conclusion of yours? A. Yes, sir."

Thereupon he was challenged for cause. On examination of the prosecuting attorney he was asked:

1904.]

Wyandot County.

"Q. Have you any opinion now, whether the defendant, Marsh Lindsay, is guilty of the offense? A. Yes, sir.

"Q. Well, if you have any explanation you may offer it?

A. My opinion is that he was guilty if he was in the gang with the other fellows, if he don't prove himself.

"Q. But you don't know now if he was in the gang or not?

A. I have no opinion that he is guilty.

"Q. Have you an opinion now that he was in the gang?

A. Not any more than as they have indicted him.

"Q. If the judge here told you that you need not consider the fact that he was indicted, could you lay aside that fact and not consider that as evidence against him? A. I think I could.

"Q. Could you, notwithstanding any bias, opinion or prejudice that you may have, render a fair and impartial verdict according to the law and evidence? A. Yes, sir."

Thereupon challenge for cause overruled, and the juror was challenged peremptorily by the defendant.

The opinion which should exclude a juror must be one of a fixed and determined character, deliberately formed and still entertained, and one that in an undue measure shuts out a different belief, as when the opinion of the juror has been formed upon the evidence given in a former trial, or when the opinion of the prisoner's guilt has become a fixed belief, and under such conditions it would be wrong to receive the juror. On the other hand, when his opinion or impressions are founded upon rumor or reports in newspapers, which the juror feels conscious he can dismiss, and is able to say he can fairly try the prisoner on the evidence, he ought not to be excluded.

Taking all that the juror, Cross, says in his examination, it shows that his opinion falls within the latter class. He said from what he had talked and read about the other trials, that he had an opinion in his mind as to the guilt or innocence of the defendant; and that opinion would follow him into the jury box. If he had no evidence against it, it would influence him if he had no other evidence. The remainder of the examination in chief is but a repetition of the same thought. In his cross-examination, after he is told as to the effect of the fact that the defendant was indicted, and the report that the defendant belonged to the gang, that his opinion so formed would not influence him, unless the evidence sustained it; and,

finally, in reply to a question by the prosecuting attorney whether he could, notwithstanding any bias, opinion or prejudice that he then had, render a fair and impartial verdict according to the law and the evidence, he answers he could.

This case presents a test of the principle whether the reading of newspaper reports, rumors and the fact that a party is indicted and an opinion formed from these sources shall disqualify a juror. To so hold we think would require us to recede from the practice that has been established in this state testing the qualification of jurors.

In *Goins v. State*, 46 Ohio St., 457, the juror had conversed with the father of the deceased on the day of the tragedy, and with others who claimed to have been eye-witnesses, and described all about it, and the court, having put the question whether, notwithstanding his opinion, he could render a fair and impartial verdict according to the law and the evidence, and the juror answering that he could, the juror was not disqualified, or the reception of the juror was not an abuse of the discretion lodged in the trial court to warrant a reversal of the judgment on that ground alone. It is not clear in the case at bar that the prejudice or opinion of the juror resulted from talking with any witness who professed to be acquainted with the facts, or that had any knowledge excepting such as was gained from newspaper reports, or in talking with persons who professed to know the facts.

Under these circumstances we do not think the trial court abused its discretion in coming to the conclusion, from the whole examination, that the juror would, if selected, render a fair and impartial verdict. Such conclusion may be drawn from the fact that the court so accepted him. This court, in coming to this conclusion, believes that it is following the trend of decisions in Ohio, as found in *McCarthy v. State*, 5 C. C., 627; *Blair v. State*, 5 C. C., 496; *McHugh v. State*, 42 Ohio St., 154, 160; *Doll v. State*, 45 Ohio St., 445, 446; *Goins v. State*, 46 Ohio St., 457; *Jones v. State*, 14 C. C., 35; *Limerick v. State*, 14 C. C., 207. To same effect are the following authorities out of the state: *State v. Cunningham*, 12 S. W. Rep., 376 (100 Mo., 382); *State v. Sawtelle*, 66 N. H., 488 (10 Am. Cr. Rep., 347).

7. Did the court err in its charge to the jury?

1904.]

Wyandot County.

Before argument the defendant requested the court to charge certain propositions of law, which the court gave as requested.

Among the propositions as requested and given is the following:

“The law and the evidence should be their, the jury’s, only guide in determining the guilt or innocence of the defendant. Has the state established by clear, convincing and satisfactory evidence beyond a reasonable doubt, that the defendant is guilty as charged in the indictment, or of some other degree of murder or manslaughter, or it may be assault and battery, or assault merely; otherwise your verdict should be not guilty.”

II. Defines a reasonable doubt.

III. The nature, effect and purpose of the defense of an alibi, and how proven.

IV. The effect of and indictment being found against the defendant; that it is not of itself any evidence of the defendant’s guilt.

V. As to the claim and evidence offered by the state tending to prove that five different persons participated in the commission of the crime mentioned in the indictment.

The instructions so given before argument on these several propositions of law are correct, and the general charge on the same propositions are in harmony with them.

The principal contention, however, arises on the general charge, wherein the court instructed the jury, that while the indictment charges the crime of murder in the first degree, the statute requires the jury, in case they find the defendant guilty under such indictment, to determine the degree of the offense of which they so find him guilty. It is contended by plaintiff in error there was error in so instructing the jury.

The indictment charges the accused with purposely killing the deceased, while perpetrating or attempting to perpetrate a robbery; and if the evidence tended to show no other grade of offense, it was error to charge the jury that if they found him guilty under the indictment, to determine the degree of offense of which they so found him guilty, and in further saying to the jury that there were included within the terms of the indictment lesser offenses than murder in the first degree. The contention is, that it was error, under these conditions, for the

jury to render a verdict fixing a degree less than murder in the first degree; that the charge is murder in the first degree, and if not so found, the verdict should have been an acquittal.

In every charge of murder in this state the rule is, that when the fact of killing is established, the law presumes the killing to be no higher than murder in the second degree, if there be no explanatory circumstances in the evidence introduced by the state, and none are proven by the prisoner. To establish the higher degree, namely, murder in the first degree, the state must establish premeditated malice, or that the killing was committed by administering poison, or in perpetrating or attempting to perpetrate a robbery, etc. *Prima facie* every unlawful killing is murder, for malice is presumed unless the prisoner shows extenuating circumstances, which take away the presumption of malice. This is a common law presumption, but where the Legislature classified murder into degrees, the burden is upon the state to show that the homicide is murder in the first degree, the common law presumption rising no higher than the second degree.

Section 7316, Revised Statutes, provides:

“When the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any inferior degree; and if the offense charged is murder, and the accused be convicted by confession in open court, the court shall examine the witnesses and determine the degree of the crime, and pronounce sentence accordingly.”

In the instructions requested by defendant and given by the court before the argument, the rule of law is recognized, the jury is to determine whether the state has established by clear, convincing and satisfactory evidence, beyond a reasonable doubt, that the defendant is guilty as charged in the indictment, or of some other degree of murder or of manslaughter; otherwise their verdict should be not guilty.

To have directed the jury that they must find the prisoner guilty of murder in the first degree or acquit, would have been an invasion of the jury's right to determine, or ascertain from the evidence before them of which of the degrees of the crime

1904.]

Wyandot County.

the defendant was guilty, as he stood charged in the indictment. *Beaudien v. State*, 8 Ohio St., 634; *Robbins v. State*, 8 Ohio St., 131.

There would be no question as to the correctness of the court's instruction in this regard were it not for the apparent conflict with the case of *Dresback v. State*, 38 Ohio St., 365. In that case the court held:

"That on the trial of an indictment for murder in the first degree, charging the accused with purposely killing another by administering poison, the evidence tending to show no other grade of offense, it is error to charge the jury to the effect that if they find the accused guilty, their duty will be fulfilled by convicting of murder in the first or second degree, or manslaughter."

The jury must be left free to determine the degree of the crime, where the indictment charges an offense including different degrees. This principle was violated in the case of *Dresback v. State*, *supra*, when the court told the jury their duty will be fulfilled by convicting of murder in the first or second degree, or manslaughter. Their duty is only discharged when, from the evidence they determine, first, if the accused is guilty as he stands charged in the indictment, and further, from the same source, determine or ascertain the degree of the crime, where the offense includes different degrees, as in that of murder.

The principle of the law is, that the jury must not be imperatively required to render a verdict for a particular degree of homicide; nor must the instruction be such as to deny to them the power of rendering such verdict as their judgment and conscience dictate, after being fully instructed as to their duty. *Adams v. State*, 29 Ohio St., 412, 415.

8. Misconduct of prosecuting attorney in his closing argument to the jury.

It appears from the fragmentary extracts of the argument, as shown by the record, that the prosecutor made allusion to conditions, but the record is very indefinite as to just what was intended to be conveyed by the remarks made; for example:

"Why don't they put Walker on the stand? The moment he put Walker on the stand and he swore he slept with George

Ury, he would bring Miller to show it was he who slept with Ury."

"Shuck and his whole family say he was near the Johnson house on the sixteenth day of last September."

Without reproducing more of the record, we are of the opinion that these comments are not of that character that would warrant a reversal of the judgment.

9. That the verdict of the jury is not supported by sufficient evidence.

The defendant was found guilty of murder in the second degree as he stood charged in the indictment, and not guilty of murder in the first degree as therein charged; and it is contended by plaintiff in error that the verdict is not supported by sufficient evidence. The record is a very voluminous one, and we have taken the time, and with care and labor gone through and carefully examined the whole record. There is much positive and direct evidence on the part of the state as to the identity of the plaintiff in error as being one of the five men who were present at the time and place, and who took part in committing the homicide. On the other hand, the defendant produced many witnesses who testified with a great deal of positiveness as to his presence elsewhere at the time the homicide was committed. This evidence tended to establish, and, it is claimed, did establish what is known in the law as an alibi. The evidence is conflicting on this question as to the alibi. If the evidence on the part of the state is true as to the identity of the plaintiff, and as to his presence at the time and place when and where the homicide was committed, then he is guilty beyond a reasonable doubt. If the testimony of the defendant is to be believed as to his presence elsewhere at that time, then he could not be guilty.

The jury found the issue thus made against the defendant, and we can not consistently with the rules of law say, from a careful examination of all the evidence, that they were manifestly wrong in so finding.

The court has reached a unanimous conclusion upon all the questions involved, including the one now under consideration; and, without attempting to review the record in detail, we are of the opinion the verdict is supported by the evidence.

1904.]

Clark County.

The case has been ably and well tried by able counsel on both sides, and with clear and proper instructions from the court resulted in a verdict of guilty against the plaintiff in error of murder in the second degree.

This court can not disturb the verdict under the well recognized rules of law governing reviewing courts in reviewing and passing upon the sufficiency of evidence to support verdicts of juries in criminal cases.

Finding no error in the record, the judgment of the common pleas court is affirmed with costs, and execution is awarded and the cause remanded for execution.

E. T. Dunn, John M. Winn and W. R. Hare, for plaintiff in error.

Benjamin Meck, for defendant in error.

NOTICE OF APPEAL.

[Circuit Court of Clark County.]

ROBERT A. KERAUVER v. FRANKLIN P. BATDORF.

Decided, May Term, 1903.

Appeal—Notice of—Legality of, Where Signed by Counsel—Section 5227.

Where it appears from the record that the attorney signing the notice of appeal was the attorney of the appellant from the beginning of the action, and had signed other papers with the approval of his client, his authority to sign a notice of appeal will be presumed, and only clear proof can overcome this presumption.

SULLIVAN, J.; SUMMERS, J., and WILSON, J., concur.

On motion to dismiss appeal.

The defendant moves the court to dismiss the appeal taken in this case, for the reason that a written notice of appeal "as required by Section 5227, Revised Statutes, as amended October 22, 1902 (96 O. L., 12), was not given by plaintiff. The section as amended provides that a party desiring to appeal his cause to the circuit court shall, within three days after the order or

judgment is entered, file with the clerk of the common pleas court a written notice of such intention, and within thirty days after the entering of such judgment or order give an undertaking," etc.

The notice filed and found with the papers in the case is signed in the following manner: "Robert Kefauver, by Rein-hoel, his attorney." The defendant contends that the record does not show that the attorney was authorized to sign plaintiff's name to the notice, and that such authority can not be presumed, though the record shows that the attorney named represented the plaintiff in the common pleas court from the bringing of the action until it passed into judgment; that the above section as amended requires the notice to be signed by the party, and if the attorney signs his client's name, it must affirmatively appear that he was authorized to do so, and there is no presumption of such authority, arising from the fact that the record shows the attorney to have conducted the suit for appellant from the beginning of the action until the order or judgment appealed from was entered; that in this case the plaintiff, as appears from the record, was and is a non-resident of the state of Ohio, and a resident of the state of Maryland, and that within the time that the notice was required to be given, the attorney could not have received authority. The motion was submitted upon the facts as shown by the record.

On the other hand, plaintiff contends that the section as amended does not require the notice to be signed by the party; that this was not the purpose of the amendment; that it was simply to avoid controversy between parties, as to whether notice of appeal had in fact been given, and when given.

The statute, Section 5227, Revised Statutes, prior to the amendment of October 22, 1902, provided that "A party desiring to appeal his cause to the circuit court shall within three days after the judgment or order is entered, enter on the records notice of such intention." Unless this notice was entered upon the record within three days, the right of appeal was lost, though the party may have given such notice verbally in open court, and the judge may have entered the fact of such notice

1904.]

Clark County.

upon his docket. The record alone determined whether the required notice had been given, and the time when entered, and the omission to enter the notice upon the record could not be remedied by *nunc pro tunc*. Therefore, the controversy suggested by appellant's counsel could not arise.

The Legislature had some object in view in amending the statute. It was not to have it appear of record that an appeal had been taken, for as we have seen, before the amendment to the statute the notice had to be entered on the record. The section now, as well as before the amendment, provided that the party should enter the notice upon the record, but this was almost universally done by the attorney, and frequently without the knowledge of the party, and perhaps without and conference with the party whether he desired to take an appeal.

That it should appear of record that the party had, in fact, taken an appeal, is, we think, the only reason apparent for the amendment. As to the necessity or wisdom of the amendment, we neither consider or discuss. The section expressly provides that the party, and not the attorney, shall give the written notice, and for the purpose, we think, to have the record show that the *party had taken the appeal*.

"The right of appeal exists only by virtue of the statute, and to give the appellate court jurisdiction the statutory provisions must be strictly followed." *Brown v. Wallace*, 66 Ohio St., 57.

The party, however, may authorize his attorney to sign such notice. The remaining question presented here is whether this authority is presumed from counsel's employment in the cause as shown by the record, or from the style in which this notice is signed.

Counsel for appellee contends that an attorney's authority ceases when the judgment is rendered. After that he has no authority to act for and bind the party in the action, and hence no presumption of authority to do so arises. He further contends that the record shows that the residence of the party being in another state was so remote from the court that it was impossible for counsel to have received express authority within the period that such notice was required to be given.

Upon the first point he cites two authorities which we have

not considered fully, for the reason, we think, they are not in point upon the state of facts presented in the case before us. The second we think not well taken, for the reason that authority could have been given by the party by other methods than by mail, and by the party before the case had passed into judgment.

The record shows the counsel signing the notice to have been employed by the appellant throughout the entire proceedings; that he is the attorney of record, and that his services were accepted by the appellant signing papers in the action with his approval.

“The act of the attorney in entering the appearance of a defendant carries with it a presumption of due authority upon his part to do so.” *Garrison v. McGowan*, 48 Cal., 592, 600; *Harshey v. Blackmarr*, 20 Iowa, 161 (89 Am. Dec., 520).

If relief be sought against a judgment rendered after such entry of appearance upon the ground of want of authority of the attorney, it is incumbent upon the party to make out a clear and unmixed case.

In the cases cited it did not appear from the record that the attorneys entering the appearance of the defendants had any authority to do so at the time it was done. In the case before us, it appears from the record that the attorney signing the notice was the attorney of the appellant from the beginning of the action and throughout the entire proceedings in the case, signing, during its progress, papers in the case. We are of the opinion, therefore, that his authority to sign the notice must be presumed, and such presumption could only be overcome by clear proof.

The motion, therefore, to dismiss the appeal is overruled.

After the court had disposed of the motion upon the submission upon the record, the appellee asked leave to offer testimony as to counsel's authority to sign appellant's name to the notice of appeal, which was refused; to which refusal, as well as to overruling the motion to dismiss the appeal, counsel for defendant, at the time, excepted.

Martin & Martin, for motion.

D. F. Reinhoel, contra.

1904.]

Hamilton County.

JUSTICE OF THE PEACE.

[Circuit Court of Hamilton County.]

LOUISE MEYERS v. JOSIAH DWIGHT.

Decided, January 13, 1903.

Jurisdiction—Of Justice of the Peace—To Take Appeal Bond in Case Begun Before Another Justice.

Where a justice of the peace hears and determines a case filed before another justice who is temporarily disabled, the appeal bond must be perfected before the justice originally having jurisdiction.

PER CURIAM.

This cause was originally brought before R. J. Stauverman, justice of the peace in and for Springfield township, and summons was, on December 30, 1901, issued by him.

On January 29, 1902, the following entry was made on Justice Stauverman's docket:

"1902, January 29. This cause was called, R. J. Stauverman, issuing magistrate, being unable on account of sickness to try the case, D. J. Smith, one of the justices of the peace of Springfield township, tried the action in his stead. Plaintiff being sworn, testified. And defendant, Mrs. Josiah Dwight, and her daughter, Miss Dwight, also being sworn and testified. And after hearing the testimony, judgment is for defendant and the cost taxed against plaintiff amounting to \$5.50.

"D. J. SMITH,
"Acting Justice of the Peace."

On February 4, 1902, Harry W. Morten signed plaintiff's appeal bond, to which this certificate appears:

"Approved by and signed before me this fourth day of February, A. D. 1902.

"RICHARD J. STAUVERMAN,
"Justice of the Peace."

The common pleas court dismissed the appeal, on the ground that it was not perfected in the manner required by Section 6583, Revised Statutes, in that the appeal bond was not approved by the justice of the peace who rendered the judgment:

"In all cases not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace, to the court of common pleas of the county where the judgment was rendered."

And Section 6584, Revised Statutes:

"The party appealing shall, within ten days from the rendition of the judgment, enter into an undertaking to the adverse party with at least one good and sufficient surety to be approved of by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of the judgment and costs."

Section 601, Revised Statutes, provides:

"In case of the sickness or other disability, or necessary absence of a justice at the time appointed for trial, another justice of the same township may, at his request, attend in his behalf, and shall thereupon become vested with the power, for the time being, of the justice before whom the summons was returnable; in that case the proper entry of the proceeding before the attending justice, subscribed by him, must be made in the docket of the justice before whom the writ was returnable; if the cause is adjourned, the justice before whom the summons was returnable must resume jurisdiction."

We are of opinion that in sitting in the place of Justice Stauverman, in the trial of this case, Justice Smith was exercising the power of Justice Stauverman, with which Justice Smith was "*for the time being*," "*vested*."

The judgment was, for all ministerial purposes—that is, for all purposes not immediately part of the hearing—the judgment of Justice Stauverman. Of course, this could not be for purposes of a motion for a new trial or signing a bill of exceptions. Justice Smith's assumption of power only lasted for the time being, and did not continue for ten days within which the appeal bond might be given.

We are of opinion that the appeal was perfected according to law, and that the court below erred in dismissing the cause. Judgment reversed.

1904.]

Hamilton County.

LAWS RECOGNIZING MORAL CLAIMS.

[Circuit Court of Hamilton County.]

STATE OF OHIO, ON THE RELATION OF F. C. AMPT ET AL, v. JOHN
H. GIBSON, TREASURER OF HAMILTON COUNTY ET AL.*

Decided, July 30, 1904.

Constitutional Law—Legislative and Judicial Power—Retroactive Legislation—Moral Claims.

The act of April, 1904, for the relief of county treasurers and county commissioners, is not a legislative interference with the judgment of a court.

GIFFEN P. J.; JELKE, J., and SWING, J., concur.

We are of opinion that the act of April, 1904, entitled an "Act for the relief of County Treasurers and County Commissioners" does not contravene Section 16 of the Bill of Rights; Section 32, of Article II; or Section 1, Article IV of the Constitution, as being legislative interference with the judgment of a court.

This act is passed in recognition of the binding force and effect of the judgment of the Supreme Court in cause No. 8737, in deference to said judgment and because of it.

Neither is said act opposed to Section 28, Article II of the Constitution as being retroactive. The power to make laws recognizing the moral claim involved in past transactions has always been recognized by the highest tribunals and never held to be retroactive in the sense provided against this and similar constitutional sections.

The Legislature was fully informed as to all facts with which it was dealing, and no mistake of fact appearing, no matter what we may think of the wisdom or moral purpose of this act, the conscience of the Legislature is not to be measured by the conscience of this court.

The courts will not review this phase of an act of the Legis-

*Affirming *State, ex rel, v. Gibson et al*, 2 N. P.—N. S., 221.

lature. We approve the opinion of the court below and its judgment will be affirmed.

Ampt, Ireton, Collins & Schoenle, for plaintiffs in error.

Frank F. Dinsmore, contra.

INTERFERENCE WITH WATER PIPE BY GRANTOR.

[Circuit Court of Lorain County.]

A. J. TURNER V. CLINTON DEWITT.

Decided, October 8, 1903.

Deed—In the Ordinary Warranty Form—Granting All the Appurtenances Thereto Belonging—Carries the Right to Use Waterpipe Leading to House on the Lot Sold—Notwithstanding Along Part of Its Course It Lies Withing a Lot Not Conveyed—Pleading.

1. Where a lot is conveyed by an ordinary deed of warranty, granting the premises with all appurtenances thereto belonging, the warranty covers the right to the use of the grantee of a waterpipe leading to a dwelling on the lot conveyed; and reasonable damages may be recovered by the grantee on account of the cutting of the pipe by the grantor, notwithstanding along a part of its course the pipe lies over the line and on a lot still owned by the grantor.
2. In drawing a petition in such a case it is the better practice to make the deed an exhibit, and not make it a part of the petition.

MARVIN, J.; HALE, J., and WINCH, J., concur.

The case of A. J. Turner against Clinton DeWitt is a proceeding in error to reverse the judgment of the court of common pleas of this county. In that court suit was brought by DeWitt against Turner upon this state of facts: Turner was the owner of real estate at the corner of Forest and Livingston streets in the city of Lorain, and this real estate thus owned, whether divided into lots or not I do not know, I believe it was; but in any event, the property fronting on Forest, the part of this real estate fronting on Forest and not abutting upon Livingston was sold by Turner to DeWitt; on the property thus sold to DeWitt was a dwelling house. Water was supplied to the lot sold to DeWitt by a pipe running from the

1904.]

Lorain County.

main waterpipe across the other part of this real estate of Turner's, and extending clear into and upon the lot of DeWitt. This was so at the time DeWitt received his deed from Turner. The deed was an ordinary warranty deed, and granted the premises with all the appurtenances thereunto belonging, practically that is the reading. And by the way, I think it would be well enough to criticise the petition in this case to this extent—the deed is not only made an exhibit, but a part of the petition. It would be a good deal better to follow the statute and make it an exhibit, and not make it a part of the petition. But it is admitted that the copy attached is a true copy of the deed.

So when DeWitt owned the property, he held it by a deed from Turner, which conveyed to him the property by metes and bounds, together with all the appurtenances thereunto belonging. As already stated, the pipe passing along of course under the surface of the other land of Turner, conveyed water to DeWitt's property. After DeWitt purchased the property he had connections made with the hydrant which was already upon the lot and to which water was conveyed by the pipe already spoken of, so that water was conveyed into his house.

Some time after the purchase by DeWitt, Turner cut the waterpipe near the line, or close to the line, between his own property, which he still retained, and that of DeWitt, and thereby cut off the supply of water to DeWitt. In his answer he says that DeWitt was in arrears for water rent, and under some rule of the water company the water would be cut off from them both, but that is not sustained by the evidence.

The claim on the part of Turner is, that he had a right to cut that water off; that he sold by metes and bounds to DeWitt the lot; that DeWitt still has the lot; he never has interfered with his having the lot, but that he did not sell him any waterpipe or any rights in any waterpipe. Of course, if he did convey to him any rights, it is because either to the necessary enjoyment of the property which he did sell this pipe was an appurtenance, or because the deed conveyed the land with the appurtenances.

The evidence shows that to the proper enjoyment of this property purchased from Turner by DeWitt it was necessary to have the water upon the lot, and the cutting off by Turner of the waterpipe necessitated DeWitt making a connection from Forest street to his premises, and that connection the evidence shows was an expense of \$23.80. That is to say, that amount was paid to the man who put in the connection; then he had to pay the water company \$5 for something, I do not exactly know what, and he says his land was injured by the earth being thrown up to make the ditch, and it was a good deal of injury to his lawn.

The case was tried to the court without a jury. The court rendered judgment for DeWitt for \$25. Neither in the motion for a new trial nor in the petition in error is any complaint made that the amount allowed was excessive; if that were made, we should hold against it.

We understand that by this deed DeWitt had an interest as an appurtenance to his property in this waterpipe, and that it was an interference with the appurtenance, which Turner had warranted to DeWitt, when he cut it.

In Second Metcalf, the case of *Johnson v. Jordan*, beginning on page 234, certain propositions are announced by the court, and pretty well recognized by the profession, and are well expressed. On page 240:

“There are some general and well settled rules of construction of conveyances, which tend in some degree to settle the question. The language of the deed is the language of the grantor; he selects the terms, and it being supposed that he will insert all that has been agreed upon beneficial to himself, and will be less careful to state fully all which is beneficial to the grantee, the language is to be construed most strongly against the grantor. Another well settled rule of construction is, that a grant of any principal thing shall be taken to carry with it all which is necessary to the beneficial enjoyment of the thing granted, and which is in the power of the grantor to convey. When therefore a party has erected a mill on his own land, and then sells the mill, without the land through which such artificial raceway passes, the right to use such raceway through the grantor’s land shall pass as a privilege annexed *de facto* to the mill and necessary to its beneficial use. (Citing authorities). ”

1904.]

Jefferson County.

“Under these rules, it might perhaps be held, that if a man, owning two tenements, has built a house on one, and annexed thereto a drain, passing through the other, if he sell and convey the house with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it; and because such construction would be most beneficial to the grantee.”

Without reading further we think that authority is in point, that when that deed was made granting this property and appurtenances, it carried with it the right to have water through this waterpipe; when that was cut off a damage was done to the plaintiff below, DeWitt, which under his deed Turner was bound to warrant against, and he was therefore liable in damages, and the judgment of the court of common pleas is affirmed.

D. H. Aiken and G. E. Hall, for plaintiff in error.

C. F. Adams and C. Chapman, for defendant in error.

RIGHTS OF NON-RESIDENT ALIENS.

[Circuit Court of Jefferson County.]

J. OSCAR NAYLOR, ADMINISTRATOR, v. THE PITTSBURGH, CINCINNATI & ST. LOUIS RAILWAY COMPANY.

Decided, May Term, 1904.

Non-resident Aliens—May Enforce Claims for Property Rights—And a Claim for Negligently Causing Death is a Property Right—Sections 6134 and 6135 Construed—Treaty with Italy.

1. Non-resident aliens are entitled to the benefits conferred by Sections 6134 and 6135 of the Revised Statutes, and an action may be maintained for their benefit, for negligently causing death in this state.
2. Under the treaty between the United States and the Kingdom of Italy, ratified November 18, 1871, citizens of that kingdom have the same right to enforce a claim in this country respecting property as our own citizens, and a claim in favor of next of kin for negligently causing death in this state is a property right.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

Error to the Court of Common Pleas of Jefferson County.

The action below was to recover damages for negligently causing the death of Bassillo Marino. The deceased was a native of the Kingdom of Italy, and had been but a short time in the state of Ohio, working for defendant in error, but a few days. At the time of his death he had a wife and two children residing in Italy, and who still reside there. Defendant in error in the court below set up as a second defense in its answer that the beneficiaries on whose behalf the action was prosecuted were non-resident aliens, being residents of the Kingdom of Italy. To this defense a general demurrer was filed, which the court overruled, holding that it was a complete defense to the action, and the petition of the plaintiff was dismissed.

The question and the only question made upon error is: Can an action be maintained for negligently causing the death of a person in this state, where the beneficiaries are non-resident aliens?

This question has been determined differently in the different states, and from the decisions it would seem that it has been differently determined in England, where liability for negligently causing death was first created by statute, and that this question is not yet settled there.

The authorities being antagonistic, it becomes necessary to determine the question largely on principle, giving to the decisions of the different states that consideration to which they seem to us to be entitled, and following those that we consider most in consonance with reason and correct principle.

Most of the difficulty arises from the difference of opinion existing as to the manner of construing the acts of the different states, fashioned after Lord Campbell's Act. Some eminent courts have held that such statutes, being in derogation of the common law, should be strictly construed; while others, particularly the Supreme Court of the United States, have held that they are remedial in their nature, and therefore should be liberally construed.

This court follows the holding of the Supreme Court of the United States in the case of *Alvida Schell et al v. The Youngs-*

1904.]

Jefferson County.

town Iron & Steel Company, 4 C. C.—N. S., 172, where the authorities are referred to.

Keeping in view that the purpose to be accomplished by these statutes is primarily to get rid of a maxim of the common law regarding the survival of personal actions and the comprehensiveness of our own statute, it would seem that there ought not to be a difference of opinion upon the question; and yet the courts of some of the states, with statutes as broad as our own, have held that non-resident aliens can derive no benefit from this statute.

Section 6134 is very general:

“Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the corporation which, or the person who would have been liable if death had not ensued, * * * shall be liable to an action for damages notwithstanding the death of the person injured.”

That is to say, the corporation or person shall be liable in damages in the same manner as if death had not ensued, and if the person or corporation is to be liable in the same manner as if death had not ensued, how can it be said that this language is not sufficiently comprehensive to include non-resident aliens as beneficiaries?

Section 6135:

“Every such action shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused.”

There is no question as to the liability of the person or corporation if death had not ensued, and the same liability by express language of the statute attaches in case of death, the manner of proceeding and the parties to be benefited being fully provided for. To hold that such actions can not be maintained for the benefit of non-resident aliens, it seems to us, would be a partial nullification of the statute.

The case of *Deni v. Penna. R. R. Co.*, 181 Pennsylvania State, 525, is the initial case holding to the restrictive rule and is the case generally relied upon in all the states that hold that an action can not be maintained for the benefit of non-resident aliens.

The syllabus of that case is:

“Under the act of April 26, 1855, P. L., 309, which gives a right to recover damages for an injury causing death, a non-resident alien mother has no standing to maintain an action against a citizen of the state of Pennsylvania to recover damages for the death of her son.”

It must be conceded that the statute of Pennsylvania is, in all essential particulars, the same as the statute of our own state. In that state the action is prosecuted directly in the name of the beneficiaries, while in our own an administrator is appointed who prosecutes the suit for the benefit of the beneficiaries; but these distinctions are unimportant.

We are not impressed with the reasoning of the learned judge who delivered the opinion of the court in that case. In it he says:

“Our statute was not intended to confer upon non-resident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extra-territorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include non-resident alien husbands, widows, children and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we can not adopt it. A non-resident defendant is not entitled to the benefit of our exemption laws, although the language of those laws may admit of a construction which would include him. It has been so held in a number of our cases. In this connection the language of Mr. Justice Sterrett in *Collum's Appeal*, 2 Pennypacker, 130, is pertinent. In delivering the opinion of the court he said: ‘While non-resident debtors may perhaps be within the letter of the act, we do not think they are within the spirit. As was said by Mr. Justice Woodward, in *Yelverton v. Burton*, 2 Casey, 351, and afterwards quoted approvingly by the present Chief-Justice in *McCarthy's Appeal*,

1904.]

Jefferson County.

18 P. F. Smith, 217, we do not legislate for men beyond our jurisdiction.' In one respect, at least, our act of 1855 resembles our exemption laws. It is intended, primarily, for the benefit of the family of which the deceased was a member."

This would seem to be a very close and narrow construction of the statute; and the statement of the learned judge is in some respects inaccurate. His reasoning would seem to make the case apply to all non-residents, whether residents of the other states of the Union or of foreign nations. He says: "The statute has no extra-territorial force." That is in direct conflict with the holding of the courts in nearly all the states and of the Supreme Court of the United States. See cases cited in *Schell v. Iron & Steel Company, supra*. Indeed, the courts of Pennsylvania enforce the statutes of the different states upon this subject (*Knight v. West Jersey Railroad Co.*, 108 Penn. St., 250). Again he says: "We do not legislate for men beyond our jurisdiction." That is not in accord with the generally accepted doctrine. As was said by Mr. Chief-Justice Holmes, now of the Supreme Court of the United States, in *Mulhall v. Fallon*, 176 Mass., 268:

"It is true that legislative power is territorial and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case—the power that governs them makes no objection—there is nothing to hinder their accepting what is offered."

Our Supreme Court has repudiated the doctrine of the Pennsylvania case, on the reasoning therein contained—that non-resident debtors are not entitled to the benefit of our exemption laws under the general terms contained in the statute where there are no express words extending their benefit to non-resident debtors. In *Sproul v. McCoy*, 26 O. S., 577, it was held:

"The exemptions from execution or sale" allowed to every person who has a family, "under the provisions of the act of April 16, 1873 (70th Ohio Laws, 132), may be claimed by any debtor against whom an action is pending in the courts of this state, whether such debtor be or be not a resident of this state."

In *Mulhall v. Fallon*, already referred to, Mr. Chief-Justice Holmes, after referring to the different cases on the subject, further says:

“The question then becomes one of construction, and of construction upon a point upon which it is probable that the Legislature never thought when they passed the act. In view of the decisions to which we have referred, we lay on one side, as too absolute, some expressions which are to be found in the English cases, some of which are cited in *Adam v. British & Foreign Steamship Company*, 79 L. T. (N. S.), 3. Our different relations to our neighbors, politically and territorially, is a sufficient ground for a more liberal rule.

“One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon non-resident aliens (*Dani v. Pennsylvania Railroad*, 181 Penn. St., 525; *Branning v. Union Gold Mining Company*, 93 Fed. Rep., 164). But compare *Knight v. West Jersey Railroad*, 108 Penn. St., 250. On the other hand, in several states the right of the non-resident to sue is treated as too clear to need extended argument. *Philpot v. Missouri Pacific Railroad*, 85 Mo., 164, 167; *Chesapeake, Ohio & Southwestern Railroad v. Higgins*, 85 Tenn., 620, 622; *Augusta Railway v. Glover*, 92 Ga., 132, 142, 143; *Luke v. Calhoun County*, 52 Ala., 115, 118, 120.

“Under the statute, the action for death without conscious suffering takes the place of an action that could have been brought by the employe himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain (St. 1887, C. 270, Section 1, cl. 3). In the latter case there would be no exception to the right of recovery if the next of kin were non-resident aliens. It would be strange to read an exception into the general words when the wrong is so near identical, and when the different provisions are part of one scheme.”

The first paragraph of the syllabus of this case is:

“A statute can not impose duties upon a non-resident alien, but it may confer rights upon him. The St. 1887, C. 270, Section 2, confers a right to sue upon the next of kin, who is a non-resident alien.”

From the foregoing considerations we are of opinion that non-resident aliens are entitled to the benefit of our statute.

1904.]

Jefferson County.

Our relations with foreign countries, like the relation between the states, are now too close to put a construction upon a statute of such character, not necessarily required by settled rules of construction. We should also take into consideration, in arriving at the intention of the Legislature when it enacted this law and the various amendments, the condition of business and the population of our state. Large numbers of foreign citizens were employed upon our railroads, in our manufacturing and industries, who had dependent relatives in foreign lands. Can it be supposed that it was the purpose and intention of the Legislature to discriminate against these foreign dependents? If so, it would be an act not only unjust and unconscionable, but would be placing a premium upon the employment of foreign labor to the exclusion of our own citizens. It would be saying to employers of labor, "Employ a foreigner, and, in the event of his death by negligence, you are not responsible; employ a citizen, and, upon his death under the same circumstances, you will be responsible." To so hold would be imputing to the General Assembly an intent to make a narrow and unjust discrimination.

There is another reason why the sustaining of the demurrer to the second defense was clearly wrong. The widow and children of the decedent were subjects of the Kingdom of Italy. With that country and the United States there are treaty obligations, and the Federal Constitution provides, in Section 2, Article VI:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

The treaty, in Article III, provides as follows:

"The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges

as are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed by the natives.”

The widow and children of Bassillo Marino have submitted themselves to the conditions imposed upon the natives of this country and state. They have had an administrator appointed upon the estate of their deceased husband and father; they have come regularly into our courts, meeting all requirements of our practice, and asking that they have the same rights and privileges as our own citizens. Can we say, in the light of this treaty, that they shall not have and receive the same consideration and rights as any person within the state? We think not. It is very doubtful if a statute could be enacted by our Legislature discriminating against the residents of the Kingdom of Italy as to property, and it is unnecessary to cite cases to show that such a claim as these next of kin assert, in this action, is property. If the Legislature did make such discrimination, the courts could not enforce it, for the reason that it would be against the supreme law of the land. However that may be, this treaty was ratified November 18, 1871; and our statute has been amended several times since that date, and it is hardly to be supposed that the General Assembly would continue to legislate in direct antagonism to this treaty. But, on the contrary, the presumption is that the intention was that the broad language used in Sections 6134 and 6135 should include non-resident aliens as well as residents of our own state. .

The judgment of the court of comon pleas will be reversed, with instructions to sustain the demurrer to the second defense and for further proceedings.

A. C. Lewis, D. M. Gruber, Goldzier, Rogers & Krochlich,
for plaintiff in error.

Dunbar & Sweeney, for defendant in error.

1904.]

Lorain County.

SET-OFF AGAINST BALANCE DUE FOR WORK ON PUBLIC BUILDINGS.

[Circuit Court of Lorain County.]

ROBERT A. McCLURE v. LORAIN COUNTY COMMISSIONERS.

Decided, October 12, 1902.

Contract—Damages for Injury to Steam Heating System—Becomes a Valid Set-Off—Where due to Negligence of Contractor for Work on Public Buildings.

An admitted liability by a contractor for injury to steam heating system, while at work on a public building in which the system is located, becomes a valid set-off against balance due the contractor on account of the work.

HALE, J. (orally); CALDWELL, J., and MARVIN, J., concur.

Heard on error.

The case of McClure v. Lorain County Commissioners, in error to the court of common pleas. The commissioners of Lorain county were erecting a building in Oberlin to be used as a children's home. The first contractor who undertook to do the work defaulted before completing the building, and the commissioners entered into three separate contracts with McClure for the completion of the building. He brought his action to enforce payment upon these contracts of the balance claimed to be due him. While there are a number of issues made in the case, it is agreed by the parties that the amount unpaid to McClure at the time the action was brought was \$431.01, and that he was entitled to judgment for that amount, unless the set-off pleaded by the commissioners was to be allowed, and that whatever was to be allowed upon that set-off should be deducted from the \$431.01. The only issue submitted to the court was, whether that set-off should be allowed in whole or in part, and if so allowed, deducted from this amount, and judgment rendered for the balance.

The substance of that set-off is this: Prior to making these contracts with McClure the commissioners had placed in that build-

ing a steam heating system complete, and that while McClure was in possession of the building completing the building under his contracts he so negligently and carelessly operated and used this steam heating system as to cause it great injury; that he allowed the pipes to fill with water, freeze and burst, rendering the system useless without repairs; that after this was done McClure and the commissioners entered into a contract by which McClure recognized his liability for the loss and injury to the heating system, and agreed with the commissioners that they should employ a plumber to make the necessary repairs, and deduct from the amount due him the sum that it should cost to make those repairs.

A jury was waived and the case submitted to the court. Testimony was given by each side, the one tending to support and the other tending to disprove the contract, but that testimony is of such a nature and of such a character, that this court would not be authorized to disturb the finding of the trial court, because not supported by sufficient evidence.

It is said, however, that there was no consideration for this contract; that McClure was not in any way responsible for this loss. He did this work by a subcontractor, who, he alleges, was an independent contractor, and if the independent contractor meddled with this steam heating system in any way, causing the injury, he was not responsible for it. But it is sufficient to say a claim was made by the commissioners that he was so responsible. And if, in settlement of that claim, he agreed with them, as they allege he did agree, it would be a sufficient consideration.

Again, if he was in fact responsible for the loss of this steam heating system, there would be no question about his liability to the commissioners for the loss sustained thereby. There is only one view of the case in which his claim for a want of consideration could possibly be sustained. If the commissioners, for the purpose of preserving the building, bought the coal to heat the building, not for the purposes of the contractor, but for their own purposes, and the sub-contractor was really keeping up the fires because the commissioners desired him to do it to preserve the building, it might well be said the principal contractor was not responsible; but that case is hardly made in the proof.

1904.]

Lorain County.

If, as I have stated, the commissioners made the claim of McClure that he was responsible for this loss, which he conceded and made a promise to pay, or if McClure was in fact responsible for the loss, there was a sufficient consideration to support the claim.

The result of our investigation is that the record presents no cause for reversal of the judgment. The judgment of the court of common pleas is affirmed.

EXEMPTION IN LIEU OF HOMESTEAD.

[Circuit Court of Lorain County.]

C. E. CAMPBELL v. THOMAS BENNINGTON.

Decided, April 29, 1904.

Attachment—Non-resident not Entitled to Exemption in Lieu of Homestead—Sections 5438 and 5441.

The benefits of the exemption in lieu of homestead, provided by Section 5441, are limited to residents of this state.

HALE, J.; WINCH, J., and MARVIN, J., concur.

The case of *Campbell v. Bennington*, error, is prosecuted here to reverse a judgment of the court of common pleas. The action was commenced before a justice of the peace and appealed to the court of common pleas, and the only question made in the case is whether a motion to discharge and dissolve an attachment which had been issued in the case, was wrongfully overruled by the trial court, for the reason that the property attached was exempt from execution.

The facts upon which the motion was submitted were agreed to, from which it appears that the defendant was a non-resident of the state. The question made is, whether there was exempt to him in lieu of a homestead \$500.

Section 5438 provides for the exemption of a homestead to the execution debtor in the sum of \$1,000. That can only mean

a homestead situated within the state, to be occupied by the person living in the state.

Section 5441 exempts from execution property of the value of \$500 in lieu of a homestead. The judgment debtor having no homestead there is exempt to him in lieu of such homestead property of the value of \$500, and under that clause this non-resident claims this exemption. The court below ruled that he was not entitled to it. It ruled correctly. The exemption provided for by Section 5441 in lieu of a homestead has no application to controversies with non-residents. Its benefits are limited to residents of this state, and the judgment of the court of common pleas is affirmed.

Fritz Rudin, for plaintiff in error.

Metcalf & Cinniger, for defendant in error.

LIMITATION OF ACTIONS.

[Circuit Court of Columbiana County.]

AMANDA HOILES v. LODGE RIDDLE, ADMINISTRATOR.

Decided, March Term, 1904.

Limitation of Actions—When the Statute Begins to Run—As to a Claim Becoming Due at the Death of the Debtor.

When a debt becomes due at the death of a debtor, upon failure of next of kin to have administration taken out upon the estate, it is the duty of the creditor, in order to save his claim from the bar of the statute, to have letters issued in a reasonable time from the decedent's death, as the statute begins to run from the time the creditor should have had the administrator appointed, and not from the time he did have letters issued. What is a reasonable time depends upon the circumstances of each particular case.

COOK, J.; LAUBIE, J., concurs; BURROWS, J., dissents.

Error to the Court of Common Pleas of Columbiana County.

The action below was to recover damages for a breach of contract. A demurrer was sustained to the petition, for the reason that the cause of action was barred by the statute of limitations, the petition dismissed and judgment against plaintiff below for costs. Error is now prosecuted in this court to reverse the judgment of the court below.

The petition sets forth:

“That on or about the 28th day of January, 1863, said Robert Watson, the decedent, entered into a verbal contract or agreement with Samuel Klingaman, the father of plaintiff, her mother being dead at the time, by the terms of which contract, upon the consideration that he, the said Samuel Klingaman, would relinquish and surrender the person of his said child, Amanda Klingaman, plaintiff herein, and her services, society, care and control, to him, the said Robert Watson and Mary Watson, his wife, they, the said Robert Watson and Mary Watson would receive said child into their home, keep, clothe and provide for her, have her services, society, care, custody and control, and adopt her, give her their own name and thereafter treat her as their own child.

“The said Robert Watson further agreed, upon the consideration aforesaid, that he would make said child his heir and

give her all the personal property which he owned or possessed at the time of his death. He agreed that she was to have and receive the possession of said personal property at his death, if he survived his wife, Mary Watson, but if his wife, Mary Watson, survived him, then she was to receive possession of said personal property at the death of his wife, Mary Watson. Yet notwithstanding the facts hereinbefore set forth and pleaded, and in disregard and violation of the terms of the contract made by Samuel Klingaman and Robert Watson for the benefit of said plaintiff, said Robert Watson failed and neglected to make any provision for plaintiff at the time of his death, and to give plaintiff the personal property of which he might die possessed, either at his own or the death of his wife, but, on the contrary, some time before his death, made and executed his last will and testament, by the terms of which he gave all his property, both personal and real, to his wife, Mary Watson, without any devise, bequest or gift over to plaintiff, or any part of the same."

The petition further avers that the said Robert Watson did not adopt the plaintiff; neither did he make her his heir at law; but the principal ground of complaint in the petition is, as herein set forth, that he failed to give her the personal property as he had agreed to do, and damages are sought to be recovered for this breach.

As appears from the petition, Robert Watson died April 26, 1885, and Mary Watson, his wife, died September 12, 1899.

The plaintiff caused letters of administration to be issued to the defendant in error, Lodge Riddle, April 6, 1903, and on August 25, 1903, she commenced the action below.

The only question made is: Did the court err in sustaining the demurrer to the petition and dismissing the same, for the reason that the action was barred by the statute of limitations?

What is required of a creditor who seeks to enforce a claim under a contract made in this state, which accrued at the death of the debtor? Can the creditor remain idle for an indefinite period, although no administration be taken out upon the estate by the next of kin, or is it the duty of the creditor to be diligent in having an administrator appointed in order to save the claim from the bar of the statute?

In this case, plaintiff in error took no steps whatever to save her claim until April 6, 1903, a period of nearly eighteen years

from the death of Robert Watson, and her claim came within the six year bar of the statute.

This question has not been directly decided by our Supreme Court. The questions involved in the cases of *Taylor v. Thorn*, 29 O. S., 569, and *Treas. of Brown County v. Martin*, 50 O. S., 197, are not the same as the question made in this case. It was not considered by the court in either of those cases, and of course they are not decisive of the point.

We are aware that in the case of *Tobias v. Richardson*, 26 C. C. R., 81, decided in the third circuit and published since the rendering of the decision in this case, it is held:

“A cause of action accrues, within the meaning of the statute of limitations, when there co-exists a demand capable of present enforcement; a suable party against whom the demand may be then enforced, and a party in being who has a present right to enforce it. Hence, when a note becomes due after the death of the payee, the title thereto and the right to enforce payment vest in the administrator, and the fifteen year limitation (Section 4980, Revised Statutes) begins to run from the date of the administrator's appointment.”

This holding seems to be too broad. If it was the rule that absolutely the statute did not begin to run until an administrator was appointed, then claims of this character would never become stale, as in suits at law the statute of limitations alone controls as to whether a claim is stale or not. How unjust and impracticable this would be. A party might wait, as in the case under consideration, until all the witnesses to the contract but one, who was interested as a father, were dead, and then have an administrator appointed and commence action.

In the nineteenth volume of the American & English Encyclopedia of Law, 211, it is said:

“Independently of special provisions for such cases, the plaintiff can not defer, by his own laches, the time at which the running of the statute shall begin. The statute runs from the time when he might have perfected his right, irrespective of the time at which he actually perfects it. In some jurisdictions this rule is declared by special provision.”

In support of the text the author refers, among others, to the case of *Rauscrman v. Blunt*, 147 U. S., 647, and in that case Mr. Justice Gray says:

“In the absence of express statute or controlling adjudication to the contrary, two general rules are well settled. First. When the statute of limitations has once begun to run its operation is not suspended by subsequent disability to sue (*Walden v. Gratz*, 1 Wheat., 292; *Mercer v. Selden*, 1 How., 37; *Harris v. McGavern*, 99 U. S., 161; *McDonald v. Hovey*, 1102 U. S., 619). Second. The bar of the statute can not be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or preserve his claim. *Richards v. Maryland Ins. Co.*, 8 Crouch, 84; *Braum v. Saurewein*, 10 Wall., 218; *United States v. Wilby*, 508, 513, 514; *Kirby v. Lake Shore & Mich. Southern R. R.*, 120 U. S., 130, 140; *Amy v. Waterton*, 130 U. S., 320, 325.

Did not plaintiff in error fail to avail herself of a means within her power to preserve and prosecute her claim? Section 6005, Revised Statutes, provides:

“If the persons so entitled to administer are incompetent or evidently unsuitable for the discharge of the trust, or if they neglect, without any sufficient cause, to take administration of the estate, the court shall commit it to one or more of the principal creditors, if there be any competent and willing to undertake the trust. If there be no such creditor, the court shall commit administration to such other person as it shall think fit.”

If the next of kin failed to take out letters of administration, it was her privilege to have had such letters issued to any suitable person, and if she wished to preserve her claim, it was her duty to have an administrator appointed and commence her action before the time elapsed to bar her claim. This is the rule, at least, laid down by the Supreme Court of the United States.

Upon page 211 of the 19th volume of the American & English Encyclopædia of Law, it is again said:

“In many jurisdictions, however, the foregoing rule is modified to the extent that a reasonable time is allowed to the plaintiff within which to perfect his right of action, and the statute does not begin to run until after the elapse of this reasonable time.”

Many cases are cited by the author in support of this statement. Among others, cases from the state of Kansas, and it was under the statute of that state that the case of *Bauserman*

v. *Blunt*, *supra*, was decided, and the court held that it was controlled by the decisions of that state, and therefore a reasonable time must be allowed to take out letters of administration, the last paragraph of the syllabus being as follows:

"The statute of limitations, as construed by the Supreme Court of the state, stops running at the death of the debtor but for such reasonable time only as will enable the creditor to have an administrator appointed."

Again, in the same volume, on page 219, it is said:

"Where there is no person in existence capable of suing or being sued, no fault can be imputed to a claimant for failure to bring his action, and the rule is therefore well settled that the statute does not begin to run in such case until there is in existence some one capable of suing and some one who may be sued. This rule is subject to the qualification that if it is in the power of the claimant to remove the incapacity, the exemption continues only for a reasonable time after he might have brought about a condition which would enable him to sue."

Again, on page 221, same volume:

"Where, as in practically all the jurisdictions of the United States, a claimant has it in his power to procure the appointment of a personal representative by or against whom the suit may be begun and prosecuted, a reasonable time only in which to procure such appointment is allowed to such claimant, after the expiration of which the statute will run in any event. In many of the states the time of the suspension of the statutes in such cases is fixed by statute."

We have quoted largely from the *Encyclopædia of Law*, for the reason that it contains a reference to all the recent cases upon the question, and we have been unable to find any authority justifying the theory that a creditor can permit time to run indefinitely where, as in this state, it is in his power to have a personal representative appointed. The Supreme Court of the state of Kansas probably so held at one time, but it has repudiated the doctrine, if it ever existed in that state, and now holds that the creditor must have an administrator appointed in a reasonable time.

In *Bauserman v. Charlotte*, 46 Kansas R., 480; 26 Pacific R., 1051, the court of that state finally held:

“Under the provisions of the statutes of Kansas, a creditor of a decedent having a claim which he wishes to establish against the estate may, if the widow or next of kin refuse to take out letters of administration, obtain letters for himself, or some other person, after fifty days from the death of the decedent; and he can not, without any good cause or reason therefor, defer making such application until the statute of limitations has run, and then claim that all of the time, from the death of the debtor to the appointment of the administrator, the statute of limitations is suspended on account of such administrator. If the creditor would save his claim against the estate of the decedent from the bar of the statute, he must exercise reasonable diligence, if the widow or next of kin refuse to take out letters of administration, to obtain administration for himself or some other person.”

The statute of the state of Kansas is almost the same as the statute of this state. The facts of the case are identical with the facts in this case, the cause of action having accrued at the death of the debtor. The opinion of Mr. Chief-Justice Horton is exhaustive and convincing, and, it would seem, should be decisive of the question.

What is a reasonable time in which to have a personal representative appointed must, of necessity, depend upon the circumstances of each particular case.

In *Bauserman v. Blunt*, *supra*, it was held that five months and twenty days was not a reasonable time, where there was no suggestion in the petition that the creditor was ignorant of the debtor's death.

In the case under consideration, plaintiff in error, with full knowledge of debtor's death, delayed for nearly eighteen years before having letters of administration issued and the commencement of her action, and if we deduct the period of limitations, six years, there still remains nearly twelve years, which is certainly unreasonable.

The judgment of the court below will be affirmed.

W. H. Spence, for plaintiff in error.

David Fording and Craine & Snyder, for defendant in error.

1904.]

Lucas County.

ADDITIONS BY BOARDS OF EQUALIZATION.

[Circuit Court of Lucas County.]

BIRCHARD A. HAYES v. JOSEPH L. YOST, TREASURER OF LUCAS CO.

Decided, January Term, 1902.

Taxes—Duties of Boards of Equalization—What the Record Must Show Where Additions are Made to Tax Returns—Personal Notice to Owner of Property Required.

1. The provisions of Section 2807, relating to the equalizing of assessments and making of additions to tax lists, is mandatory and must be strictly complied with. 4 C. C., 502, followed.
2. Where additions are made, the facts relating to each separate item, which have been established by satisfactory evidence, should be entered upon the record with sufficient fullness and clearness to show whether or not the addition made by the board was justified.
3. The notice required under Section 2807 must be served upon the property owner personally and proof made to that effect.

HAYNES, J.; PARKER, J., concurs.

Heard on error.

In this case a petition in error was filed for the purpose of reversing the judgment of the court of common pleas. The original action was brought by Yost, treasurer, against Hayes, setting up that there was assessed against him certain personal taxes for certain years, to-wit, the years 1895, 1896, 1897 and 1898, and in certain amounts, and praying for a judgment aggregating \$257.93. To this an answer was filed, setting up the fact that these taxes for these respective years were made up in part of certain penalties—and he proceeds to state that he made returns for these years of his personal taxes under Sections 7, 8, 9, and made oath to them, and delivered them to the assessor. He states that these returns made by him were just, correct and true, and states the amount of the valuations that the return showed for each year respectively; and he says that the board of equalization for these years subsequently increased the valuation of the property without any evidence before them, without any proof that the original return that the defendant made was not correct, or that the defendant had any personal property,

moneys or credit which were not included in said returns for taxation, and that said additions, and each of them, were made by said board without any statement of facts entered on the journal, upon which the additions were based or authorized. He makes further allegations as to the penalty on these returns, because they were incorrect and unjust. He further says that he had no knowledge of said several additions, or either of them, until long after the final adjournment of said board in each of said years respectively. He asserts that he tendered to the plaintiff before the commencement of this action the sum of \$173.12 in payment of the claims set up in the petition. The case was tried in the court below upon an agreed statement of facts, or rather, I should say, that court was asked to separately state the facts and the conclusions of law, and the court found from the testimony as facts in this case as follows:

“First. The defendant was, during the whole of each of the years 1895, 1896, 1897 and 1898, a resident of the seventh ward in the city of Toledo, county of Lucas and state of Ohio, and in the month of April in each of said years listed personal property for taxation and made return thereof *under oath* to the assessor of said ward; that the total valuation of said personal property, as returned by said defendant, was, in 1894, \$1,930; in 1895, \$1,450; in 1896, \$1,440; in 1897, \$1,140; in 1898, \$1,310, and that in each of said years said personal property was returned upon the following items and no others, as appeared on said returns and in Section 2737, Revised Statutes of Ohio, to-wit, the sixth (including bicycles), the seventh, the eighth and the ninth.

“Second. That in each of the years 1895, 1896, 1897 and 1898, the said board of equalization caused to be deposited in the post office at Toledo, postage prepaid, a notice addressed to the defendant, at his residence, to appear before said board and show cause why his return of personal property should not be increased.

“Third. That the defendant, because of temporary absence from Toledo, received each of said respective notices, so mailed in each of said years, after the said board had adjourned *sine die* for the year; but no other notice was ever given by the said board or received by said defendant.

“Fourth. That in the year 1895, said board of equalization added to the return so made by the defendant the sum of \$520; and that the statement of facts entered on the journal of the

1904.]

Lucas County.

board, as to its reasons for such addition was as follows, and not otherwise.

"The board having been in session daily since May 27, 1895, and after hearing and investigating all complaints made to them, ordered the following changes to be made, viz.:

"Ward.	Name.	Increased Dollars.
"7th.	Hayes, B. A.	\$520."

The findings and orders for the years 1896, 1897 and 1898 are set out fully hereinafter:

"Eighth. That the defendant never brought any action under Section 5848, Revised Statutes of Ohio, against the plaintiff or any of his predecessors in office.

"Ninth. That before this cause was commenced, the defendant tendered to the plaintiff the sum of \$173.12 in full payment of the claim set up in the petition, but that the plaintiff refused to receive the same."

The court finds as conclusions of law:

"First. That the respective statements of fact entered on the journal of said board of equalization were in full compliance with the statutes.

"Second. That the respective notices mailed to the defendant were each in full compliance with the statute.

"The court therefore finds that there is now legally due the plaintiff, Joseph L. Yost, the treasurer of Lucas county, Ohio, for the years 1895, 1896, 1897 and 1898 for personal taxes from the defendant the sum of \$233.68, with interest at six per cent. from the date of this decree.

"The court further orders said defendant to pay said sum to said treasurer within ten days from date and upon failure thereof that execution may issue according to law."

We are unable to agree with the court of common pleas in his findings in that respect. We find a case that has been decided by the Supreme Court of Ohio, *Fratz v. Mueller*, 35 Ohio St., 397, the first syllabus of which is as follows:

"The board of equalization added to a sworn return of personal property for taxation, which included the monthly average value of goods and merchandise during the preceding year, an additional valuation to such monthly average, and entered upon its journal a statement, as the reason for such increase, that in view of the facts, the return was insufficient and below the actual value of the property. *Held*: That this was a suffi-

cient compliance with the statute which requires a statement of the facts to be entered upon the journal of the board."

It will be noticed in regard to the return in that action, that the plaintiff was a merchant and he made returns upon the list that was furnished to him, and that the list in regard to merchandise requires that he should give the average monthly value of goods, and that was the only question that was before the board of equalization so far as appears by the record; and the only question that was before the Supreme Court in the decision made by it, and the statement of facts entered upon the journal in that case, as was already stated, was as follows, page 398:

"On motion, the amount set opposite the names of the following persons was added to their personal returns for the reason that the amount returned by the parties respectively was, in view of the facts, considered insufficient and below the actual value of the property owned or held by the parties:

"Ward 19, John M. Mueller, 425 Front street, Item 10, \$1,000."

Now the board had a single question before it, and that was the average value of property under Item 10, and the board held that the return was insufficient and *below the actual monthly average* of the property held by said Mueller.

Well, that was the ultimate fact proved in that particular case, the only fact. There was no question in regard to the other items. The board was not required to set out the evidence, but the ultimate fact; and the ultimate fact found was that the value was too low. Under Item 10 the merchant was required to return the average of all goods, etc. The board found that the actual monthly value was too low. It was said by the Circuit Court of Hamilton County in an opinion that the Supreme Court had gone to the utmost verge of the statute in that particular case. However that may be, tested by the rule as to the finding of facts, the entries made by the board on the journal of statement of facts in all except the last of these cases is wholly insufficient.

Now in the above statement for 1895 the board say they heard and investigated complaints made to them and ordered changes to be made; no finding of facts whatever are stated. The change

1904.]

Lucas County.

seems to have been entirely arbitrary upon the part of the board.

In the next year the finding is:

“On July 25 the board commenced to hear the statements of all parties interested appearing before the board and taking into consideration other testimony produced, ordered the following changes to be made in the returns made by the assessors of the different wards and by incorporated companies to the county auditor.”

There is no finding of any fact, either in that year or the following, as to the items under either of these respective heads that he was ordered to and attempted to make return upon.

“In the year 1897 said board of equalization added to the return so made by the defendant the sum of \$400, and the statement of facts entered on the journal of the board, as its reasons for such addition, was as follows, and not otherwise: ‘*Resolved*, That in view of said statement and upon other evidence satisfactory to this board, the following changes are hereby ordered made in the returns made by the assessors of the different wards of the city of Toledo of the personal property of the parties named below as set opposite their respective names.’

“In 1896 said board of equalization added to the return so made by the defendant the sum of \$530, and the statement of facts entered on the journal of the board, as its reasons for such addition, was as follows, and not otherwise: ‘On motion the amount set opposite the names of the following persons was added to their personal returns, for the reason that the amount returned by the parties respectively was in view of the fact established by the evidence presented to this board in regular session considered insufficient and below the actual value of the property owned or held by the parties.’”

Evidently they attempted to follow the last statement in the case decided in *Fratz v. Mueller*, *supra*, the only difference in the two cases being, in the one there was a single item; in the other they made an addition to four different items, not to the items themselves, but to the aggregate amount of all the items. They did not find, for instance, that the return of the one item was too low, or the second item or the third or the fourth, or that there were any articles of property or items omitted; they only took the aggregate of the items and added to it a certain sum. The criticism made by counsel for plaintiff is that the

parties should have stated whether the amount of the finding was on account of the low valuation or upon failure to return certain items that should have been returned under the statute, so that the party would have knowledge of the basis on which the board acted.

Now there is a reason in this thing. There is some sound sense in it. The party is required by the statute to make return under oath or affirmation that when he makes that return, he has made it correctly; the county auditor is to place that amount on the tax duplicate and the party is to pay his taxes upon it. A board of revision is appointed—the board of revision attempts to add to his returns on the ground that they are incorrect in some form; they attempt to impose upon him additional burdens, which, in many cases, require a greater amount of taxes to be paid; in others, a less amount. We suppose the object and purpose of making the statement against whom changes are made is to enable parties to have an opportunity to rectify the change by such method as the law permits him to have and exercise for the correction of matters of that kind, by injunction or error or any other manner of defense in a case of that kind. He being absent when the findings are made and when the questionable matters were added, if the board undertake to make changes, it would seem just and right and proper that they should state the facts under which they act, so that the party may challenge their action if he desires to do so.

In Cooley Taxation (1st Ed.), 256, the matter is discussed:

“That is as to the right of a party to a hearing, the justice and equity of it is set forth there. The statute requires that the party shall have reasonable notice so that he may be present. It really amounts to a trial, and the issue is whether the party has returned his property for the full amount; it ought to have some semblance of form and action that is required in an ordinary court of justice that rules against a man, for this really amounts to a judgment that he shall pay additional taxes.”

It is barely possible that the last statement of facts may be within the decision of the Supreme Court; we are, however, rather inclined against that view; we think the board should have set forth the facts, whether the value was too low on any one of the four items, or whether the party had omitted from

those items any particular article or thing that ought to have been returned.

This matter has been up more than once in the Circuit Court of Hamilton County, and that court has apparently given the matter a great deal of attention and have made several decisions. I cite one decision, *Ratterman v. Niehaus*, 4 C. C., 502; there are half a dozen cases consolidated. The syllabus is:

"1. Section 2807, Revised Statutes, governing the equalizing of assessments, which provides that 'when any addition shall be ordered to be made to any list returned under oath, a statement of the facts on which such addition was made shall be entered on the journal of the board' is mandatory and must be strictly complied with.

"2. It is not sufficient merely to state that an addition was made; the facts which have been proved to them by satisfactory evidence and upon which the addition was made should be stated clearly, so that the officer or court before whom may come the reviewing of the acts of the board of equalization, shall be able, on inspection of the record, to see whether the facts therein stated are such as to justify the action of the board."

There is quite a long decision upon the question and citation of authorities in regard to what constitutes a finding of facts under the decisions of the Supreme Court of this state. In the above case the judgment of the circuit court was affirmed by the Supreme Court. It was a judgment for the enjoining of the collection of the additional taxes.

Now in regard to the question of notice. These additions were made, as we understand, under Section 2807, Revised Statutes. There are several statutes in regard to equalizing boards in different cities, and the provisions in regard to some matters in each are the same. I speak of this because I see there is a citation from a Cincinnati case which was under another statute in regard to an increased amount on real estate.

Section 2807, Revised Statutes, is as follows:

"The said boards shall hear complaints and equalize the assessments of all personal property, moneys and credits, new entries and new structures returned for the current year by the township assessors and county auditors; and they shall have power to add to or deduct from the valuation of personal property, or moneys or credits, of any person returned by the assessor or county auditor, or which may have been omitted by them, or to add other items upon such evidence as shall be sit-

isfactory to the said boards, whether said return be made upon oath of each person or upon the valuation of the assessor or county auditor, but when any addition shall be ordered to be made to any list returned under oath, a statement of facts upon which such addition was made shall be entered upon the journal of the boards. Provided, that no such addition shall be made to such list returned under oath without the board having first given reasonable notice to the person or persons (if their residence be within the county) whose personal property is sought to be added to or the valuation thereof increased, to appear before said board at a time and place to be fixed by said board, and show cause why such addition should not be made, or why such valuation should not be increased."

It will be noticed that notice is to be given those who make returns under oath who are residents of the county. Now it appears by the agreed statement of facts in the case that the written notice was deposited in the post office at some time, it is not stated when, directed to Mr. Hayes at his residence; that he was temporarily absent from the city, so he did not receive it, in each year, until after the board had adjourned. How long a time before adjournment that notice was put in the post office is not stated, nor perhaps is it very material; sufficient to know that by the ordinary course of business the letter reached his house, but did not reach him until after the board had adjourned—until after his rights in the matters were foreclosed, so far as the board was concerned.

Now the question is as to the character of the service that is to be had on this notice. The statute provides that the party shall be given reasonable notice. He is to have a notice that is reasonable, notice as to the time and place so he may have an opportunity to appear. Notice is to be given to him. The court below found that a notice put in the post office directed to him was sufficient. We are unable to agree with the court in that respect, because we find decisions of the Supreme Court of this state and other courts that lead us to an opposite conclusion. And because, in reason, if he is to have notice, it should be given to him in person, served upon him, so that the board, before it acts, may know that he has received it and that it has jurisdiction over him.

In the case of *Moore v. Given*, 39 Ohio St., 661, the second syllabus says:

“Where a statute requires notice of a proceeding, but is silent concerning its form and manner of service, actual notice will alone satisfy such requirements.”

And again in the decision of the case it was laid down as a positive rule of law. Now that statute was in regard to a partition fence, and the obligation of the parties to build a portion, and in case of any disagreement, a notice was to be served upon the parties by the township trustees, perhaps the commissioners to apportion the work.

The Circuit Court of Hamilton County had this matter again before it under Section 2804, Revised Statutes, in regard to the action of the board of revision of real estate, but the language is the same in each. In the case of *Perkins v. Zumstein*, 4 C. C., 371, that court says:

“Section 2804, Revised Statutes, prohibiting the county and city boards of equalization from increasing the valuation of real estate, except on reasonable notice to all persons directly interested, and an opportunity for full hearing of the questions involved, is mandatory, and must be strictly complied with,” and “where no other kind of notice is prescribed in the statute, it must be actual notice.

“Notice of intent to increase valuation served on one owner of an undivided interest in real estate will not bind any of the others.”

Now the court says in announcing the opinion in that case:

“If the language of the statute were not sufficiently clear to show its mandatory character, there are abundant authorities so deciding. In *Cooley on Taxation*, page 287, it is laid down, ‘so all provisions designed to give the tax-payer an opportunity of the review of the assessments themselves, or on an appeal, are exclusively in his interest. Every notice which the statute provides for that end, whether by publication or otherwise, must be given with scrupulous observance of all its requirements. The notice can not be shortened a single day without rendering it ineffectual; the presumption being that the law has made it as short as was deemed consistent with due protection. A published notice can not be received as the substitute for a notice to be personally delivered to the party concerned,’ * * * and the same rule applies to any notice required by subsequent proceedings, and when a statute requires notice of a proceeding, but is silent concerning its form or manner of service, *actual notice* will alone satisfy such requirement.” Citing cases as

follows: *Moore v. Given*, 39 Ohio St., 661; *Roche v. Dubuque*, 42 Ia., 250; *Lagroue v. Rains*, 48 Mo., 536; *Powers' Appeal, In re*, 29 Mich., 504; *Plumer v. Marathon Co. (Supprs.)*, 50 N. W. Rep., 416 (46 Wis., 163); *Rathbun v. Acker*, 18 Barb., 393; *St. Louis v. Goebel*, 32 Mo., 295.

Neither of these cases seem to have been taken to the Supreme Court; but the Legislature, probably acting on the decisions of that court in regard to the provisions of that statute in regard to real estate, passed an act soon after that, found in 69 O. L., 175, providing for the service of notices in cases of this kind: (1) by delivering a copy thereof to the person or persons interested in said real estate, or by leaving such copy at the usual place of residence or business of such person or persons; or if such place of residence or business shall not be found in the county; (2, by delivering such copy to the agent in charge of said real estate to collect the rents thereof; or, if no such agent shall be found in the county, (3) by publishing thereof, inserted in a newspaper one time etc.; and that court has held since that time that these should come in this succession, first, giving the notice by delivering a copy to the persons interested, or, if that can not be done, then the others in their order.

We have examined this matter very carefully and come to the conclusion we have, both upon authority, and we think upon principle, that the service of notice under this statute should be made to the party personally; that there is no provision of law or principle of law that we find authorizing the making of service by simply depositing a letter in the post office addressed to the party. Of course, if such letter was received by the party in time to obtain a hearing at the time stated in the notice and he appear, he would be bound by it. But it is incumbent upon the board itself to know that the paper has been received by the party and service has been made upon him in that respect. It should be served by a proper person or officer and proof made to that effect.

Holding these views, the judgment of the court of common pleas will be reversed, and this court proceeding to render the judgment that court should have rendered, judgment will be rendered for the amount only admitted to be due, and which had been tendered by the defendant.

1904].

Lucas County.

EXTRA COMPENSATION OF COUNTY OFFICERS.

[Circuit Court of Lucas County.]

STATE, EX REL, v. WILLIAM M. GODFREY.

Decided, February 16, 1903.

Omitted Taxes—Compensation to County Auditors for Collecting—Where Assisted by Tax Inquisitors—Additional Clerk Hire on Account of Decennial Appraisement—Indexing Records of County Commissioners.

1. The fact that an inquisitor is employed and paid for furnishing evidence to the county auditor, whereby property is placed on the tax duplicate which had been improperly omitted therefrom, does not deprive the auditor of the 4 per cent. compensation on the amount thus collected, provided for in Section 1071 relating to the fees of county auditors.
2. A county auditor is entitled to receive for indexing the records of the county commissioners the same fees as other officers receive for like services.
3. The provision in Section 1076 for an additional allowance to the county auditor for clerk hire, during the period when the decennial appraisement is being made of real property, is not limited to the year during which the reappraisement is actually made, but includes so much of the year following as may be necessary for the boards of equalization to complete their work, subject to the limitation of the statute requiring that this work be done before the fourth Monday in January of the second year following the reappraisement.

HULL, J.; HAYNES, J., and PARKER, J., concur.

Heard on error.

This action was brought in the court below, *State v. Godfrey*, by the prosecutor in the name of the state of Ohio to recover certain sums from the defendant, William M. Godfrey, which it was claimed he had illegally drawn as auditor of Lucas county. There were five causes of action in the petition. An answer was filed to the petition, setting forth separate defenses to each cause of action. A demurrer was filed to each defense in the answer. The court of common pleas sustained the demurrer to the defenses to the first and fourth causes of action, and overruled the demurrer of the plaintiff to the defenses to the second,

third and fifth causes of action. Subsequently, the plaintiff dismissed the fourth cause of action of its petition, and the parties not pleading further, judgment was then entered in the court of common pleas upon the first, second, third and fifth causes of action, in accordance with the ruling on demurrer.

The court below held, in passing upon the demurrer to the defenses to these separate causes of action, that a cause of action was not stated in either the second, third or fifth causes of action in the petition, and, therefore, the demurrer to the answers to these causes of action was overruled, which in effect was the same as sustaining a demurrer, had one been filed, to these various causes of action in the petition, and judgment was entered in favor of the defendant upon them. A petition in error was filed in this court to reverse the judgment of the court of common pleas as to these three causes of action. These causes of action must be considered separately.

The second cause of action in the petition is to recover \$2,768.91 upon bills presented by the county auditor for placing upon the tax duplicate of the county certain omitted properties and levies for taxes. The cause of action as set forth in the petition is as follows:

“That in the year 1900 the said William M. Godfrey drew out of and withheld and still withholds from the county treasury the sum of \$2,768.91 upon certain bills presented by him for services rendered in placing upon the tax duplicate of said county certain properties and levies for taxes furnished by the tax inquisitor, a person employed by authority of Lucas county to furnish said information, and who was duly paid therefor by said county of Lucas out of said county treasury; that said bills were illegally presented, and there was not and is no authority at law for the allowance of the same or the drawing out of the money for the payment thereof, or for the withholding of the same from the said county treasury, and the state of Ohio should recover thereon from said William M. Godfrey the sum of \$2,768.91.”

This cause of action thus stated, and the answer to it, raises the question as to whether the auditor is entitled to four per cent. for placing omitted property upon the tax duplicate for taxation in counties where a tax inquisitor has been employed

1904.]

Lucas County.

to aid him and furnish him with evidence in the performance of his duty, the tax inquisitor being paid a percentage by the county. The court of common pleas held, in passing upon the demurrer, that this cause of action as stated in the petition, did not constitute a cause of action against the defendant. The section which allows the auditor fees for such services is Section 1071, Revised Statutes, which provides:

“In addition to the compensation specified in the two preceding sections the auditors of the several counties shall receive the compensation provided by law for their services as members of the boards for listing railroads, and under the school laws, and as county sealers, and in filing away statements of taxable property, and also four per centum of the amount of tax collected and paid into the county treasury [on property], omitted and placed by them on the tax duplicate.”

This was passed June 3, 1871, and is found in 76 O. L., 117.

The statutes relating to the auditor's powers and duties in respect to placing property upon the tax duplicate and his powers in regard to summoning persons before him in his investigations, and procuring evidence, are Sections 2781, 2781a, 2782 and 2783, Revised Statutes. These sections make it his duty to act in the matter of omitted property or false returns, and give him power to summon witnesses before him to testify in any investigation made by him. The general act relating to the employment of tax inquisitors is Section 1343-1, Revised Statutes. The act under which the tax inquisitor was employed in this county is Section 1343a, Revised Statutes, and is as follows:

“That the county commissioners, county auditor and county treasurer, or a majority of said officers of any county in this state containing a city of the first class, and in any county containing a city of the first grade of the second class, shall have full and final power to employ any person or persons to ascertain and furnish to the county auditor the facts and evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax duplicate; no payment for such services to be made except in accordance with the terms of an agreement between the said officers, or a majority of them, and such person or persons; and such payment shall be made to such person or persons only out of money actually paid into the county treasury as taxes on such omitted property; and such

compensation shall be apportioned ratably by the county auditor among all the funds entitled to share in the distribution of such taxes, including the state itself, as well as the counties, townships, cities, villages, school districts, and other organizations entitled thereto."

The claim is that in counties where an inquisitor is employed and paid for furnishing the evidence to the auditor, the auditor is not entitled to the four per cent. on omitted property which he places upon the tax duplicate, as was allowed and paid in this case.

There is no reference to the inquisitor statutes in Section 1071, Revised Statutes, which provides for the payment of this percentage to the auditor, so that there is no express repeal of that provision or exception, where inquisitors are employed, but it is urged that the inquisitor performs all of the duties, when he is employed, which the auditor is required to perform in the premises, and therefore that the auditor should not have and is not entitled to any compensation; that the inquisitor takes the place of the auditor; that he procures the property to be placed upon the tax duplicate, and that the auditor has nothing to do except to perform the clerical act of entering the property upon the duplicate; and that therefore the inquisitor is the only one who is entitled to pay for the services in such cases.

The powers and duties of the auditor in this matter have been before the Supreme Court in one or two cases. It has been held that the auditor in this matter acts not entirely in a ministerial capacity; that his duties are of a *quasi* judicial character; that it is his duty to hear the evidence that may be offered before him; that the tax-payer himself may appear and give his own evidence and any other evidence that he may see fit to offer; that evidence may be offered upon the other side; and that in the end, after all the evidence is in, it is the duty of the auditor to act in a *quasi* judicial capacity and to determine the question whether the property should be subjected to taxation and placed upon the tax duplicate or not.

His compensation for these services, under Section 1071, Revised Statutes, does not depend upon the actual amount of labor which he performs or the volume of testimony which he considers

1904.]

Lucas County.

in performing this duty, but depends upon whether in the end he puts the property upon the tax duplicate, and whether finally taxes are collected upon that property and paid into the county treasury. In the case of *State v. Crites*, 48 Ohio St., 142, the Supreme Court held that if an auditor refused to act in a case of this kind where evidence was offered him tending to show that a tax-payer had omitted to return property, he might be compelled by a writ of mandamus to act. The court say in the third paragraph of the syllabus:

“It is the duty of a county auditor to act under Sections 2781 and 2782, Revised Statutes, whenever he is informed or has reason to believe that property has been improperly omitted from the tax duplicate of the county. If he declines to act upon the reasonable information, a petition in mandamus, by a relator who seeks to compel him to act, is sufficient, if it states facts showing that there was reason to believe that property had been improperly omitted from the tax duplicate.”

The auditor in this case acted in obedience to the writ, and required Mr. Brice to appear before him. The relator in the case was the tax inquisitor of Allen county. The auditor heard the evidence furnished by the relator, and also took the testimony of Mr. Brice himself, and perhaps other testimony offered in his behalf, and then acted, as he claimed, according to his own judgment and discretion in placing property upon the tax duplicate. The inquisitor not being satisfied with the action of the auditor, filed a motion in the Supreme Court to attach him for contempt of court, and set forth his various grounds of complaint. This motion was denied, and the Supreme Court say in the third paragraph of the syllabus of the case, *State v. Crites, supra*:

“The remedy by mandamus, while appropriate to compel an officer to proceed in a judicial or *quasi* judicial matter confided by law to his jurisdiction, can not be invoked to correct his errors, or control his discretion.”

And in the opinion, which was delivered by Judge Bradbury, on page 464, the court say:

“The first clause of the motion seems to assume that the peremptory writ commanded the respondent to conduct the inves-

tigation upon the evidence submitted to him by the relator. This is not correct. An examination of both the peremptory writ and the opinion delivered in the case, will not disclose any purpose in this court, when it awarded the writ, to prescribe to the respondent the evidence he should consider when making the investigation. It commanded him to proceed in the matter, but left his discretion untrammelled, not only as to the testimony he should consider, but also as to the conclusion he might reach."

On page 415 of the opinion this is found:

"The respondent was acting in a *quasi* judicial capacity; he had assumed jurisdiction and entered upon the investigation; the law imposed upon him the duty of hearing and weighing evidence and rendering a decision upon it. This, necessarily, involved the exercise of judicial discretion."

The court finally overruled the motion and discharged the rule at the cost of the relator, and held that while the court might compel the auditor to act in the premises, it could not tell him how to act, nor could his errors of judgment be reviewed upon a motion for attachment for contempt of court.

In *Probasco v. Raine*, 50 Ohio St., 378, the court held, as laid down in the syllabus:

"The fee of four per centum to county auditors, provided for by Section 1071, Revised Statutes, does not disqualify such auditors from performing the duties, and exercising the powers imposed on them by Sections 2781 and 2782, Revised Statutes."

And in discussing the question Judge Burket in the opinion, on page 391, says:

"To have equality in taxation, all property must be brought upon the duplicate. Some officer must be authorized and empowered to cause all property to be listed for taxation. Such officer must be paid for his services, either by fees or salary. The Legislature has full power under the Constitution to say what officer shall perform such duties, and in what manner he shall be paid.

"It was enacted that such duties shall be performed by the auditor, and that he shall be paid as provided in Section 1071. In the opinion of the Legislature this is a proper means to attain, in part at least, equal taxation. It matters not whether the auditor acts judicially or ministerially in the discharge of his duties. The Legislature is free to employ such means, as in its

1904.]

Lucas County.

opinion, shall be most effective, whether they be judicial or ministerial, or both."

Further along on this page the court say:

"A probate judge acts judicially in the appointment of guardians and administrators, and receives a fee for each appointment, and yet such fee does not disqualify him from acting in the premises."

Attention is called to these decisions of the Supreme Court to show in what capacity the auditor acts, and that in the opinion of the court he is paid, and properly paid, for sitting in this *quasi*-judicial capacity, and determining whether property shall be placed upon the tax duplicate or not. As they say, whether it is a judicial act or a ministerial act, he is the tax officer of the county, and it is proper that some officer should perform this service, and proper that his compensation should be provided for by the Legislature. As already said, his compensation does not depend upon the amount of labor that he performs in any given case.

In the case of *Gager v. Prout*, 48 Ohio St., 89, the only evidence before the auditor was a certified copy of the inventory filed by the executor of the estate of a deceased person. The court held, in the fourth paragraph of the syllabus, that in the absence of anything to the contrary, that was sufficient to warrant the auditor in making the additions.

The tax inquisitor acts in an altogether different capacity. He exercises no judicial functions. He does not determine whether the property shall go upon the tax duplicate and be subject to taxation or not. He is employed to assist the auditor in procuring evidence in investigations of this kind; employed to furnish the auditor with evidence of omitted property, as stated in the statute, "To make inquiry and furnish the county auditor the facts as to any omissions of property for taxation, and the evidence necessary to authorize him to subject to taxation any property improperly omitted from the tax duplicate." He is an officer authorized by law and whose duty it is to aid in bringing omitted property upon the tax duplicate by furnishing evidence. As was held by the Supreme Court, the auditor is

not required to rest upon the evidence or facts furnished by the inquisitor; he may make further investigation. If he is not satisfied that the evidence of the inquisitor is sufficient, he may procure further evidence, if possible, to warrant him in placing property on the tax duplicate, or as in the Brice case, *State v. Crites, supra*, he may call the property owner himself before him, and interrogate him, and procure evidence from whatever source he desires; and when the evidence is all in, that furnished by the inquisitor as well as that coming from other sources, the auditor in all cases exercises his own judgment, and he himself if that action is taken, in the end, place the property upon the tax duplicate.

In our judgment the court of common pleas was right in holding that no cause of action was stated in the second cause of action of the petition; that the inquisitor statute does not repeal or modify by implication Section 1071, Revised Statutes, which relates to the fees of the auditor; that the auditor is still entitled to his four per cent. notwithstanding the fact that an inquisitor was employed and aided him in these matters. Repeals by implication, it has been said by the Supreme Court of this state, are not favored. *State v. Dudley*, 1 Ohio St., 437, 441—an opinion by Judge Ranney:

“As repeals by implication are not favored, the repugnancy between the provisions of two statutes must be clear, and so contrary to each other that they can not be reconciled, in order to make the latter a repeal of the former. This rule is the result of a long course of decisions, and we know of no reason why it does not equally apply, when the repugnancy is alleged to exist, between a constitutional provision and a legislative enactment.”

This question was before this court in a case in Williams county, an unreported case, and the opinion was not preserved. Had it been reported, it would not have been necessary to have discussed this question as fully as it has been considered here, if at all. The case is *Hamet v. Marshall*. The court held in that case, after full argument, where the facts were the same as they are here, that the auditor was entitled to his four per cent. We therefore find no error in the judgment of the court

1904.]

Lucas County.

of common pleas in its action in regard to this cause of action.

The third cause of action was also held by the court of common pleas not to constitute a cause of action against the defendant. It is as follows:

“That in the year 1900 the said William M. Godfrey drew out of and withheld from the county treasury the sum of \$200 on account of a bill presented for indexing the journal and minutes of the board of county commissioners for the preceding year; that the said money was illegally drawn out of and withheld and is now withheld from the said county treasury without any warrant of law, and the said state of Ohio should recover from said William M. Godfrey, to be returned into said treasury of Lucas county thereon, the sum of \$200.”

An answer was filed to this cause of action and a demurrer filed to that answer. The court, however, held as to this cause of action, as in the former, that the demurrer to the answer searched the record, and that this did not constitute a cause of action against the defendant. The cause of action with the answer filed to it raises the question whether the auditor is entitled to compensation for indexing the journal and minutes of the commissioners. His claim is based upon Section 850, Revised Statutes, which provides:

“The clerk shall keep a full and complete record of the proceedings of the board, and a general index thereof, in a suitable book provided for that purpose. * * * And in counties where no index has been made of such record, the commissioners thereof are hereby authorized to cause an index to be made of such past records for such period of time subsequent to the first day of January, A. D. 1880, as the judgment of the county commissioners may determine; and the clerk shall receive for indexing, provided for in this section, such compensation as is provided for like services in other cases.”

There is no provision in any “other case” or in any other statute for giving the auditor compensation for indexing, and it is therefore urged by counsel for plaintiff in error that there being no “other cases” for an auditor to perform like services, that this is equivalent to allowing no compensation, and therefore that the auditor should have no compensation for this service.

It is urged upon the other hand that this should be construed to relate to the cases of other county officers who keep similar indexes, and that the auditor should have a reasonable compensation, according to the allowances given to other officers for keeping such or similar indexes. There are many county officers that are paid under the statutes for keeping such indexes. The sheriff, under Section 1212, Revised Statutes, receives ten cents for indexing; the clerk of courts, under Section 1257, Revised Statutes, receives fifteen cents each for indexing, and under another section for a different kind of indexing, eight cents. Section 1183, Revised Statutes, provides that the county surveyor for a portion of his services shall receive "the same fees as those of other officers for like services." Under Sections 1155 to 1157 the county recorder is allowed ten cents for indexing. So that it appears there are many cases where county officers do receive pay under the statutes for indexing. It seems to us to be clear from the language of this section that it was the intention of the Legislature that the auditor should receive compensation for these services. The language of Section 850, Revised Statutes, is that he "shall receive for indexing, provided for in this section, such compensation as is provided for like services in other cases."

There is no claim in argument, but it is conceded, that the allowance made in this case was a reasonable one, if any can be made, and not in excess of the amount allowed to other officers for like services. The amount allowed, it is said, was the same as that given the recorder by statute. If the Legislature had intended that the auditor should receive no compensation for these services it would have been a very easy matter to have said so, or to have said nothing and let it be covered by his general compensation, because it is not exactly certain under this statute what he is to receive; but if the provisions of the statute may be enforced and the intention of the Legislature carried out, that should be done, and the statute should be construed to sustain it in all of its parts, if it can be so done reasonably, by the courts. As appears from the statute relating to county surveyors, there is a provision there somewhat similar to this, that he shall receive "the same fees as other officers for like services." It is

1904.]

Lucas County.

not the best way to express a thing of this kind in a statute. It would have been better for the Legislature to have stated exactly what the auditor was to receive; but for some reason the Legislature did not express it in that way, but left it as it is written. We think that this provision of the statute can not be disregarded or set aside by the courts, and that the auditor is entitled to his compensation as provided for in this section; and no complaint being made that the allowance made to him in this case was unreasonable or excessive as compared to that given to other officers, we find no error in the action of the court of common pleas in holding that this cause of action in the petition did not state a cause of action against the defendant, and therefore overruling the demurrer to the answer.

The fifth cause of action seeks to recover from the defendant \$568.44 drawn from the county treasury in the first four months of 1901, being \$142.11 monthly for clerk hire growing out of work performed in connection with the duties of said office on account of the decennial appraisement. The auditor claims the right to draw this money under Section 1076, Revised Statutes, which reads as follows:

“The county commissioners of the several counties have authority, and are required, to make an additional allowance to the county auditor for clerk hire, not exceeding twenty-five per cent. of the annual allowance made in the preceding sections in the years when the real property is required by law to be reappraised.”

The decennial appraisement involved here commenced in the year 1900, and the appraisers were elected and made appraisement in the year 1900. It is claimed by the plaintiff that under this section of the statutes the auditor is not permitted to draw clerk hire except for the year 1900; that by the language of the statute this is limited to that year. He drew also for the first four months of the following year (1901) at the rate of \$142.11 a month, in all \$568.44. No question is made in the petition as to the amount he drew, but the claim is made that he was not entitled to draw anything. It appears from the answer that was filed to this cause of action and the contrary is not alleged in the petition, that the auditor drew twenty-five per cent. only

of the annual allowance provided for in Sections 1059 and 1070, Revised Statutes, for those four months. The contention is whether the words in the statute, "In the years when real property is required by law to be reappraised," apply only to the year 1900, when the decennial appraisers actually appraised the property, or whether they shall apply not only to that year, but to the following year, if the whole of that year is necessary for the action of the various boards of equalization and otherwise in completing the appraisement, up to the fourth Monday in January of the year 1902, when the work was required to be finished.

The court of common pleas held on the demurrer to the answer that this cause of action as set forth in the petition did not state a cause of action against the defendant; that this language of the statute covered not only the year 1900, but so much of the following year as might be necessary for the action of the various boards.

The purpose of this section of the statute is evidently to allow the auditor compensation for the additional clerk hire that is imposed upon him by reason of the decennial appraisement of real estate. The statute itself does not provide that this shall be confined to the year when the district appraisers act in the appraisement of property, but it is only confined to the years when the real property is required by law to be reappraised. The actions of the various boards subsequent to the action of the appraisers in appraising the property is as necessary to a complete reappraisal and revaluation of the property as the action of the appraisers, and in our judgment the court of common pleas was right in its action in this behalf, and it did not err in holding that this cause of action, as set forth in the petition, did not state a cause of action against the defendant.

The decision of Judge Pugsley, who decided the case in the court of common pleas, was furnished to us, and is full and clear upon all of the questions involved in this case, and from it I will read an extract upon this last question. The various statutes are collected there, and the questions discussed clearly in *State v. Godfrey*. He says:

1904.]

Lucas County.

“The sole question, therefore, raised by the petition is, whether, under the law, the commissioners were authorized to allow to the auditor for clerk hire any sum expended in 1901. The language of Section 1076, Revised Statutes, is: ‘clerk hire in the years when the real property is required by law to be reappraised. In what years does the law require the real property to be reappraised?’ I find nothing in the statute which can be construed to require the reappraisal to be made in the year 1900, or to mean as matter of fact or law that the reappraisal is made in 1900. It is true that the work of the district assessors in valuing the real property was to be performed in 1900. It was to be performed after March 1, 1900, and before the first Monday of July, 1900, when they are required to make their returns to the county auditor. Sections 2789 and 2798, Revised Statutes. But the work of the district assessors does not constitute the decennial appraisal; it is only a part of it. After errors and omissions in the assessor’s returns are corrected by the county auditor, they are then submitted to the decennial county board of equalization and the decennial city board of equalization, who proceed to equalize the valuation in the manner prescribed by law. The county board of equalization was required to convene on the third Monday of July, 1900, and to close its session on or before the first Monday in October, 1900. Section 2813, Revised Statutes, 94 O. L., 336. The city board of equalization was required to convene on the first Monday of August, 1900, and to close its session on or before the first Monday of October, 1900. Section 2815, Revised Statutes, 94 O. L., 337. After the equalization by these boards is completed, the county auditor is required to transmit to the state auditor an abstract of the property, with the valuation as returned by the assessors and equalized by said boards. The decennial state board of equalization is then required to equalize the value of the property returned in the abstracts furnished by the several county auditors among the towns and counties in the state. And this board was required to meet on the first Tuesday in December, 1900, and to close its session on or before the first Monday of May, 1901. Section 2818, Revised Statutes, 94 O. L., 337. After the equalization by the state board is completed, it is then the duty of the state auditor to transmit to the county auditors a statement of the per centum as fixed by the state board, to be added to or deducted from the valuation, and it was the duty of the county auditor, on receiving such statement, to proceed forthwith to add to or deduct from each tract or lot of land in his county the required per centum.

It was then the duty of each of the decennial boards of equalization to meet as a board of revision; the decennial county board on the first Monday of May, 1901, and to close its session on or before the fourth Monday of September, 1901, and the decennial city board to meet on the first Monday in June, 1901, and to close its session on or before the fourth Monday of January, 1902; and the county auditor after that was required to correct the tax duplicate according to the deductions and additions ordered by the board of revision. Section 2814a, Revised Statutes, 94 O. L., 247. All these proceedings to which I have referred are an essential part of the decennial appraisalment. So that the time in which the real property was required to be reappraised ran all through 1901, and did not expire until the fourth Monday of January, 1902. My conclusion, therefore, is that the expense of additional clerical help necessarily employed by defendant in 1901, is the proper subject of allowance under Section 1076, Revised Statutes. If that view is correct, the petition does not show that the amount drawn by the auditor in 1901 was illegally drawn. Having reached that conclusion, it is not necessary to consider the other questions discussed by counsel for the defendant."

We agree with the learned judge who delivered the opinion in this conclusion. This amount of \$142.11 per month drawn by the auditor for these four months was twenty-five per cent. of his allowance as provided for by Sections 1069 and 1070, Revised Statutes. Section 1076, Revised Statutes, provides, as read, that the granting to the county auditor of not to exceed twenty-five per cent. of the annual allowance made in the preceding sections is required to be done.

A question is made as to what is meant by the words "preceding sections;" whether those words relate only to Sections 1067 and 1070, Revised Statutes, which cover annual compensation, or whether they relate also to Sections 850, 1074, and 1075, Revised Statutes, which relate to other compensation to the county auditor. It is not necessary to decide that question in passing upon this case, as the compensation under consideration here was fixed on the basis of twenty-five per cent. of the allowance made to the auditor under Sections 1067 and 1070, Revised Statutes, only. However, without deciding the question at this time as to the right of the auditor to have any further compensation than what is claimed for these four

1904.]

Clark County.

months, to-wit, twenty-five per cent. of his compensation as allowed under Sections 1067 and 1070, Revised Statutes, we will say that we think it is extremely doubtful whether he could be permitted to include also the compensation allowed him under Sections 850, 1074 and 1075, Revised Statutes, as a basis for the twenty-five per cent. The question is an important one, and we only go thus far in expressing our view upon it.

The opinion of the court below was full and clear upon all of the questions in the case, and we have reached the same conclusion. The judgment of the court of common pleas will therefore be affirmed.

C. E. Sumner, Prosecuting Attorney, and *W. H. A. Read*, for plaintiff in error.

Brown & Geddes, for defendant in error.

CONTRACTS OF RELEASE FOR CLAIMS FOR INJURIES AGAINST RAILWAYS.

[Circuit Court of Clark County.]

HENRY J. BOWERS v. DETROIT SOUTHERN RAILROAD CO.

Decided, June, 1904.

Constitutional Law—Section 3365-20 Construed—Contracts of Release for Claims for Injury or Death—Mutuality of Contract—Public Policy as to Employment of Injured Persons by Railroad Companies.

1. Section 3365-20, declaring void all contracts and agreements whereby claims for damages against railroad companies for personal injuries or death are waived, does not apply to claims arising prior to the execution of such contracts of release.
2. It is not against public policy to permit a railroad company to employ persons who have been injured in its service at such labor as they may be able to perform.
3. A contract of re-employment for no stated time, in no stipulated capacity, and for no designated wages lacks mutuality; but when it is averred in an answer based upon such a contract that the plaintiff was re-employed by the defendant and continued in its employ until such time as he voluntarily relinquished the employment, such answer is good against demurrer.

WILSON, J.; SULLIVAN, J., and DUSTIN, J., concur.

The plaintiff in error filed a petition in the court below to recover from the defendant for injuries occasioned by the alleged neglect of the defendant. To the petition the defendant interposed an answer, the second defense in which is as follows:

"Second. And for a second defense defendant says that on the 18th day of November, 1902, said plaintiff, in consideration of his re-employment by said defendant, released said defendant from any and all claims that he had against said company arising out of any injuries which he may have sustained by the accident set forth in the petition; and thereupon, in consideration of said release the said defendant re-employed said plaintiff and continued to retain him in its employ until such time as the said plaintiff voluntarily left the employ of said defendant. A copy of said release is hereto attached, marked Exhibit 'A.' "

A demurrer was interposed to this defense by the plaintiff and overruled, and thereupon, the plaintiff not desiring to plead further, judgment was had for the defendant and the petition dismissed.

It is claimed on the part of the plaintiff in error that the contract pleaded in the answer was void by reason of the provisions of Section 3365-20 of the Revised Statutes. The part of that section which applies directly to this case is the latter clause, which reads:

"And no railroad company, insurance society or association, or other person, shall demand, accept, require or enter into any contract, agreement, stipulation with any other person about to enter or in the employ of any railroad company whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts the same, any other right whatsoever, and all such stipulations and agreements shall be void, and every corporation, association, or person violating or aiding or abetting in the violation of this section shall for each offense forfeit and pay to the person wronged or deprived of his rights hereunder the sum of not less than fifty dollars nor more than five hundred dollars to be recovered in a civil action."

The injury which is the predicate of the claim for damages in this case was incurred *before* the execution of the contract of

1904.]

Clark County.

release, which is challenged by the demurrer. The language of the statute is specific that as to personal injury or death, the right to damages which can not be released is one *thereafter* arising. The further language—"whereby he agrees to surrender or waive, in case he asserts the same, any other right whatsoever"—does not broaden the inhibition as to a claim for personal injury. The contract in question does not come within the statute.

It is claimed it is void as being against public policy; that to permit a railroad company to enter into a contract of this kind would favor the employment of incompetent persons in the service of the corporation, and endanger the safety of the public.

We incline to think it is not so, for the reason that the railroad company would still be held to the rule that it is liable for failure to employ competent servants in all departments, and it ought not to be held against public policy to permit a railroad company to employ persons who have been injured in its service, in such capacity as they may be able to serve, as it often furnishes employment to persons who might not otherwise be able to obtain it.

It is said that the contract is without consideration and wants mutuality. There is attached to the answer a copy of a contract which is marked "Exhibit A." It is not made part of the answer, however, and can not be looked to for the purpose of determining the demurrer. We can only look to the averments in the answer. We are free to say if the contract were pleaded so that the court could look to it, we would very seriously question whether that form of contract would impart any consideration. Re-employment for no stated time, only as may be satisfactory to said company—in no stipulated capacity—for no designated wage—does not imply mutuality. But the averments in the answer are broader: "in consideration of his re-employment by said defendant, the plaintiff released said defendant from any and all claims that he had against said company arising out of any injuries which he may have sustained by the accident set forth in the petition; that thereupon, in consideration of said release, the said defendant re-employed

said plaintiff and continued to retain him in his employ until such time as the said plaintiff voluntarily left the employ of the defendant."

The answer is not demurrable on that ground.

In the case of *Judy v. Louderman*, 48 O. S., page 563, the second syllabus reads:

"While it is necessary that the consideration of a promise should be of some value, it is sufficient if it be such as could be valuable to the party promising; and the law would not enter into an inquiry as to the inadequacy of the consideration, but will leave the parties to be the sole judges of the benefits to be derived from their contracts, unless the inadequacy of consideration is so gross as of itself to prove fraud or imposition."

We do not think the contract, as averred in the answer, is of that character. The demurrer was rightly overruled, and the judgment of the court below is affirmed.

C. E. Ballard, for plaintiff in error.

Oscar T. Martin, for defendant in error.

STREET IMPROVEMENTS.

[Circuit Court of Auglaize County.]

ELI BURKE ET AL V. THE VILLAGE OF WAPAKONETA, OHIO, ET AL.

Decided, April 23, 1904.

Street—Improvement of, by Petition—In Counties not Containing a City of the First Class—Discretion and Duty of Council—A Drain or Sewer Properly Included in the Improvement, Though not Petitioned for—Method of Assessment—Benefits.

1. In constructing a street improvement for which petition has been made, it is the duty of council and its members to avoid any abuse of discretion either in the character or cost, and to exercise good judgment in making the improvement permanent in so far as its character imports durability and permanence, and to require that it shall be done in a workmanlike manner and without extravagance.
2. Where it is found necessary in order to complete the improvement to lay a 15-inch drain or sewer, there is authority in council so to do under the power granted by the Legislature to build the street,

1904.]

Auglaize County.

- notwithstanding the drain or sewer was not requested in the petition, and might have been constructed as a separate improvement.
3. It is also within the power of council to appoint an engineer to take charge of the work, and where the one appointed has performed this work for many years for the village, and the fact of his appointment is a matter of common knowledge, the use of the words "office of the city engineer" in the advertisement for bids is not misleading, although the appointee has no separate office which is kept open at all times during business hours.
 4. A failure to publish the ordinance providing for the improvement for the requisite time after it became effective is not such a vice in the proceedings as to affect the validity of the assessment, where there is nothing to indicate that any property owner was prejudiced thereby.
 5. Where there is no claim that the expense charged against an improvement was not incurred, and no criticism as to the cost of the work or of the material, and no question as to the benefits resulting to the property, and all was done with the full knowledge and acquiescence of the property holders, the collection of the full amount of the assessment will not be enjoined on the ground that there was more included in the improvement than council was authorized to include under the petition.

NORRIS, J.; MOONEY, J., concurs; DAY, J., not sitting.

This case comes into this court on appeal and is submitted upon the second amended petition, the answer thereto and the evidence. The action is to enjoin the collection of amount for street improvement.

The plaintiffs, sixteen in number, each of them own lots abutting on East Auglaize street in this village. The method of assessment is by the foot front. They claim as reasons for enjoining the assessments that—

1. That the council has passed no resolution finding and decreeing the necessity of the improvement of the roadway.
2. The council passed no ordinance ordering and providing for the improvement of the roadway.
3. That as a part of said assessment is the cost of constructing a main sewer for a large sewer district; that the council passed no resolution declaring the necessity of the construction of the sewer, and passed no ordinance providing for and ordering the building of said sewer, and that the action and proceedings of the council concerning the necessity for the

improvement of said street, and the making of said sewer, and providing for and ordering the improvement of the roadway and the building of the sewer are illegal and void, for the reason that such resolution and such ordinance each contain two separate and distinct subjects, and provide for two separate and distinct improvements. That such ordinance provided that the clerk of said village should advertise for bids for making said improvements; that the ordinance was published for the first time on January 3, 1901; that on the same date, and before said ordinance was in force, the clerk caused the advertisement for bids to be published, and the same was published thereafter in four consecutive issues of two newspapers published in said village, thus publishing said advertisement only three times after such ordinance was in force, and that the bid of the contractor to whom said work was awarded was made in response to such advertisement. It was stated in said advertisement that the specifications and plans for said improvement were on file in the office of the village engineer, when in fact there was no such office or officer of said village, and that the contract and the performance of it, for these reasons, in no wise effected to charge the costs of said work on the abutting property of the plaintiffs.

4. The council passed no resolution finding and declaring the necessity of said sewer improvement, and passed no ordinance ordering and providing for the construction of it.

5. The village of Wapakoneta is not situated in a county containing a city of the first class, and the assent, in writing, to levy a special assessment upon property abutting on said improvement to pay the costs and expenses of the same was not given by a majority of the owners of abutting property, and, for want of such assent of such majority, the council never acquired jurisdiction to levy said special assessment upon plaintiff's said lots.

6. The levy is without notice to plaintiffs; without opportunity given to plaintiffs to be heard in relation to the validity or amount thereof.

7. The legislative enactment under which the council proceeded, namely, title 12, division 7, chapter 4, of the Re-

1904.]

Auglaize County.

vised Statutes of this state, are unconstitutional, being particularly inimical to Section 19 of Article I of the Constitution of this state, and in violation of the Fourteenth Amendment to the Constitution of the United States, because said enactment invades and violates private property without due process of law.

Plaintiffs say that said assessments should be reduced, because:

1. Said street, when the improvement was commenced, had been graded to an established grade, and drained and gravelled, and the assessment here in controversy greatly exceeds the benefits, and by reason of this said assessment should be reduced at least thirty dollars as to each lot less than that as made.

2. The report of the board of appraisers referred to in Section 5 of the ordinance of the council is unfair in this: Lots 878, 879, 880 and 881, and lot 435 were appraised at less than their value, so that under the law limiting assessments to 25 per cent. of value, the effect as to these lots, as appraised, is to throw more than a fair proportion of the costs of the improvement upon the lots of plaintiffs.

3. That because of no resolution finding the necessity, and no ordinance providing for the building of said sewer, the council had no authority to assess any part of the expense incident to said sewer on plaintiff's said lots, and that said assessment should be reduced by an amount equal to the expense of said sewer construction so assessed.

4. The sewer empties into a tank sewer at Water street, and extends to Wood street, consisting of 1194 feet of 15-inch sewer-pipe; 70 feet of 10-inch sewer-pipe; 717 feet of 6-inch sewer-pipe; 46 feet 15-inch T-pipe; 12 feet 10-inch elbows, four man-holes and fifteen catch-basins, the total cost of which, including labor, amounts to \$1,305. No opportunity was given plaintiffs to be heard concerning the plans and specifications of said sewer, and because of this as another reason, the council acquired no jurisdiction to assess the costs and expenses on the lots of plaintiff.

5. The sewer is larger and is laid deeper in the ground than necessary to drain the lots or the street and roadway, but is made to drain intersecting streets, and the assessment was arbitrary and without consideration of benefits, and for this reason the amount should be reduced as to each at least \$25. Since the publication of said assessment ordinance, the council conducted from Wood street into said sewer a 12-inch sewer—another sewer 949 feet long; that this is in fact a continuation of said Auglaize street sewer, yet no part of the Auglaize street sewer was levied on the lots or lands abutting on Wood street, and for each of these reasons and for all of them plaintiffs seek to enjoin the collection of said assessment and every part of it, because the same is thus void.

The answer denies the averments of the petition which attack the legality of the assessments, and which are assigned as grounds for the injunction, and the issues thus tendered are upon the evidence submitted to this court on appeal.

The evidence presents these facts: On the 15th day of May, 1901, a petition was presented to the council of the village of Wapakoneta asking for the improvement of Auglaize street from the east rail of the C. H. & D. Railway track to the west line of Wood street by paving, setting curbing, grading, etc., said street, and requested that the cost of said improvement be assessed upon the abutting property. Their petition was duly referred to their committee on streets, with instructions to ascertain whether or not a majority of the property owners to be assessed were in favor of the improvement and desired the council to permanently improve the street. Their committee reported that such majority had signed the petition, and the council accepted and adopted the report.

On the 21st day of May, 1901, an ordinance was passed to establish a grade on East Auglaize street, and on the 29th day of May, 1901, the engineer having been directed in that behalf, presented to the council plans and specifications for paving and improving said street and the estimate of cost of said improvement and an outlet sewer at Water street. This report of the engineer and his plans and specifications were approved by the council.

1904.]

Auglaize County.

On the 5th day of June, 1901, a resolution was passed by the council, two-thirds of the members concurring, declaring the necessity of the improvement, grading, draining, curbing, paving and otherwise improving said street in accordance with said specifications then on file in the office of the engineer, declaring that a majority of the property owners had signed the petition for said improvement, and declaring that a majority of the property owners to be charged with the cost of said improvement, having petitioned in that behalf, the cost of said improvement (less intersections, etc.) be assessed per foot front on the lots abutting the portion of said street to be improved, and directing the village clerk to publish the resolution, etc., and appoint Nicholas Schubert to serve legal notices of the passage of the resolution on the owners of property abounding and abutting the proposed improvement and make his return of such service to the council. Schubert made such service vouched by his return and affidavit on all the owners of property abounding and abutting the proposed improvement.

Thereupon on the 3d day of July the council passed an ordinance providing for the improvement in accordance with its aforesaid resolution, the cost to be assessed, fully going into detail in said ordinance concerning the improvement and its kind, referring to the specifications and plans therefor and the assessment of the costs and expenses of it, and providing for the issuing of bonds to anticipate the fund to be raised by the assessment.

By Section 3 of the ordinance the clerk is directed to advertise for bids. This ordinance to take effect after its passage and publication according to law. The ordinance was published July 4, 1901. The notice to contractors inviting bids was published July 4th, 11th, 18th and August 1, 1901. On the 16th day of August, 1901, the contract for the construction of the work was let. On the 16th day of April, 1902, the assessing ordinance was passed and published on the 24th, and duly went into effect after its publication. On the 16th day of April the resolution for the sale of bonds was passed, bids were solicited and the bonds were sold. The work having been finished, the money was paid out. All the steps leading to this final com-

pletion and payment thus appears from the evidence. And this action is to enjoin the collection of the assessment levied upon the abutting lots of the respective plaintiffs.

The evidence shows that the council did find and declare the necessity of the improvement, and did provide for the improvement by ordinance, and this upon a petition duly presented which bore the signature of a majority of those whose lots abutted upon the proposed improvement, and that these petitioners assented that the cost of the improvement be assessed on the abutting property.

In its proceedings on this petition, and in behalf of the improvement requested by it, all else being regular, it was the duty of the council and the members of that body to exercise good judgment and ordinary business sense, and to do the things necessary to accomplish the object requested by the petition. The improvement must be a permanent improvement in so far as its character imports durability and permanence, and it must be done in a workmanlike manner and without extravagance, and there must be no abuse of discretion either as to its character or its cost.

It was necessary in order to effectuate and complete this improvement to put in a 15-inch tile as was done here, even though it were not specifically requested in the petition, and not specifically declared necessary in the resolution and not specifically provided for in the ordinance, and if independent and without reference to the roadway, and if the surface of the street were not to be improved, this 15-inch drain or sewer would seem to be a separate improvement, and one which might be made at another time and by separate action of the council under other proceedings of the council relating to sewers; yet these facts would not limit the authority of the council to construct it as a part of this street improvement, if it accomplished the purpose without marked addition of expense for which it was considered to be necessary, namely, draining and making permanent the roadway. That the 15-inch tile serves other purposes as well, and was the means of extending other benefits to other property, and might be put to other uses by the residents along the street, while it at the same time performed the office of a

1904.]

Auglaize County.

complete method of draining the roadway and making the whole improvement a good, substantial, workmanlike job, would not seem to require the council to take separate action by separate petition under other sections of the statute to construct it, because it also could be built under such proceedings. The power granted by the Legislature to build the street also granted to the council the power to do the things necessary to accomplish that purpose, even though the council might do some of the things thus done under other laws and by other methods. 34 O. S., 101; 42 O. S., 585.

By the testimony of Mr. Craig, the engineer who prepared the plans and specifications by order of the council and who was the engineer in charge of the improvement, this 15-inch tile as laid and at the depth laid in said street, did effectually accomplish the purpose of draining the street and roadway, and cost no more, as he says, perhaps less than if the said street and roadway had been drained by other methods of drainage resorted to for such purposes. Now if this be true, and there is no evidence to the contrary, the putting down the 15-inch tile as it was laid in said street was good business method, and not an extravagance and abuse of discretion on the part of the council, and hence it must be treated as not a distinct and separate improvement, but as a part and a necessary part of the improvement at bar under the petition presented to the council praying for the improvement; and in this view the question of constructing a substantive and separate improvement in the nature of a sewer, and that the resolution and ordinance each contain two separate and distinct subjects, and provide for two separate and distinct improvements, are eliminated from this controversy.

The petition attacks the bid, the contract and its legality, and the legality of the advertisement requesting that bids of contractors be submitted.

It is claimed that the advertisement for bids notified contractors that the plans and specifications were on file in the office of the city engineer and might there be seen and inspected. It is claimed and conceded that there was not an officer of said village created by law known as the village engineer, and that hence a direction to contractors that the plans were on file at

the office of the village engineer was not a notification which would inform builders of the whereabouts of said plans, etc., or when or at what place they could be found and examined by contractors who desired to submit proposals to make the improvement.

A grant of power to do a specific thing carries with it the power to do all things necessary to carry into execution the power granted. It was necessary that the council select and appoint a qualified and skilled person to make plans and specifications of this proposed improvement and to act as engineer in charge of the work of construction; this—that the thing which the council was empowered to do might be properly done; and this is applicable as well to other improvements and other work carried on by that body touching said village and the improvements therein. That this was done and properly is evidenced without denial. Mr. Craig had been acting as engineer under appointment by the council for many years; he was well known and had been since 1893 as the person selected by the council to perform the duties of engineer, where work of that sort was to be done. This employment had, it seems, been almost continuous. His office was in the office of the county surveyor, which was always open during business hours. All of these facts were a matter of common knowledge in Wapakoneta and vicinity to a degree that Mr. Craig was known as the city engineer. We are of opinion that under these circumstances the advertisement for bids directing the contractors desiring to see the plans of this improvement to the office of the city engineer was in no wise misleading, but put such in possession of true and full information in that behalf.

It is urged as fatal to the advertisement for bids and all proceedings thereafter that the publication of the notice for sealed proposals was first made on the 4th of July, 1901; that this publication of the ordinance providing for the improvement was made on the 4th of July, 1901, and that the ordinance not going into effect until ten days after said 4th of July, the date of its publication, the advertisement for bids was not published for the requisite time after the ordinance became effective.

We are not of the opinion that this is a vice in the proceedings, or that which followed in consequence of it that will bear injunction of these assessments. There is nothing to indicate substantially that any property was prejudiced by it, or that any bidder was prevented from making and submitting his proposal, or that the notice failed to reach any who intended to bid or that the work might have sold for a less price, or that competition was prevented. It is not a jurisdictional matter, or an act in its nature legislative which the clerk was directed to perform. While all this would not cure such defect, and failure upon the part of the clerk to advertise for bids strictly in compliance with the terms of the statute, which is deemed to be for the protection of the tax-payer and is regarded as peremptory, yet coupled with the fact that the plaintiffs had full notice of the filing of the petition and of the action of the council upon the petition, and that the improvement was about to be made, and that the cost was to be assessed upon abutting property, and were interested and cognizant of each step taken, and had as good reason before work had commenced under the contract and before the contract was let and before expenses had been incurred, as they have since to know, and, for anything to the contrary appearing in evidence, did then know of this defect in the advertisement for bids, as well as they now know it. And further, coupled with the fact that in the face of all, they stood by and allowed the improvement to be made and the money to be expended without objection taken by legal steps.

All these facts, it would seem, present themselves for consideration in an action to enjoin the assessment, when it comes to the application of the sections of the statute which are curative in their nature and are to guard the rights of all parties and prevent violations which might otherwise arise from mistake, ignorance, negligence or irregularities, or improvidence of municipal officers and be attributable to their conduct.

The result in such case is that, while the assessment may not be and is not conclusive as to amount and is only enforceable to the extent of expense incurred, yet as to the apportioning between properties to be assessed of this amount and making it chargeable upon abutting property, the ordinance under which

the improvement is made, is regarded as conclusive, the ordinance having been passed and the method of assessment having been determined upon before the bidding and before the contract was made.

It is not claimed that the expense of this improvement was not incurred. There is no criticism of the quality of the improvement or the fairness of the price of the work and material. The objection is that the improvement was made and charged up to this street improvement which the council had no right or power to make under that proceeding, and charge and assess as a part of that street improvement.

So that as we view the case this failure upon the part of the clerk to advertise for bids for the period of four weeks after the ordinance went into force in this action, does not affect the event, and action to restrain the collection of an assessment invoking the principles of equity, the merits of the case presented by the complaining parties must show that he is entitled to substantial relief such in character as is offered by courts of equity.

The evidence clearly shows that, under circumstances, not least of which is that plaintiffs stood by and saw the improvement made and money expended without complaint and without taking legal steps to prevent it. And this, together with the fact that the expense is such as should be assessed against the abutting property, leaves the plaintiffs without that which would move a court of equity in their behalf. It might be different if this action was to restrain the collection of something in the nature of a penalty.

It does not appear from the evidence that the amount charged to each lot, though completed and apportioned by the foot front, exceeds substantially in any instance the benefits conferred upon the property by the improvement. This being the case, the method of assessment (even if this assessment itself were without the criticism which follows the failure of the clerk to properly advertise for bids) would not invalidate the assessment in the amount which does not exceed the benefit. So that we can not see where the objection, that the assessment is inimical to the Constitution of this state and the Constitution of the United States, would have application here.

The objection as to failure of notice to property owners is not made good in any respect. The evidence shows that full and complete and legal notice was given in each instance when notice was required.

Without prolonging this opinion by going into detail and without amplification in this regard, we find in neither of the five reasons set forth in the petition for reducing the amount chargeable to each lot, cause for relief in that behalf. And, altogether, in our opinion, no case is made to grant the injunction prayed in the petition.

It does not appear, however, that the improvement as to some of the plaintiffs' property abutting on the street is properly completed. Notably as to the property of plaintiffs Benjamin Burden, Grant Taylor and Jacob Culp, and perhaps others to a less extent. Surely without denial as to the lots of the plaintiffs I have named, the improvement ends at the east line of the Burden lot, and is so left at the end that the water from the intersecting street can not reach the paved street and so pass off, but is dammed up there by the insufficient grade or approach to the pavement, making an unsightly and unhealthy mudhole. Grant Taylor's lot drains to a street running along the side of his lot, and intersecting the improved street. The water draining from his lot reaches the side street, and because of the height of the surface of the improved street the water can not flow off to the side street, and so is left to stagnate, and, from the evidence, the same is true of the lot of Jacob Culp, and perhaps of others.

This condition was not intended to result from the improvement, and must be remedied, not only as to the plaintiffs whom I have specifically named, but as to the others, and wherever it exists, if it exists elsewhere. The parties are entitled to have the street so constructed and the intersecting streets so fixed and graded as to overcome the trouble of which they complain. And it seems this may be accomplished without difficulty, and must be so done without further expense to them, as well as those I have named as those I have not named, if conditions demand it. As to Burden, Taylor and Culp, the collection of the amount with which their lots stand charged will be restrained until a showing is made to this court that the defect of which I speak

Jeffrey, Mayor, v. State, ex rel Butler. [Vol. IV, N. S.]

is made right. And as to them the case is continued until the next term of this court in order that opportunity may be given the defendant to show that it has complied with this condition. The injunction is refused as to the other plaintiffs, with the admonition, however, to defendant that this court will hold defendant to the obligation to remedy any condition of the character described which may exist as to each and any of said other plaintiffs.

The costs, because of the defect in the advertisement for bids, and the reason which said defect afforded for a possible remedy, are adjudged against the defendant, and the petition as to the plaintiffs other than Burden, Taylor and Culp is dismissed and the injunction dissolved.

Judgment for costs against defendant. Execution is awarded and the case is remanded for execution.

W. E. Detweiler and F. M. Horn, for plaintiffs.

Roy E. Layton, for defendants.

THE RIGHT OF FRANCHISE UNDER THE BRANNOCK LAW.

[Circuit Court of Franklin County.]

ROBERT H. JEFFREY, MAYOR, v. THE STATE OF OHIO, EX REL
JAMES M. BUTLER, CITY SOLICITOR.*

Decided, July 1, 1904.

Brannock Law—Not Unconstitutional Because of a Denial to Any of the Right of Franchise—Courts will Presume that a True Construction of the Law will be Adopted.

The Brannock Law is not rendered invalid by reason of the possibility that certain persons may be disfranchised at an election thereunder by reason of the construction which may be given to Section 2926 of the election law. Courts will presume that the true construction of the statute will be adopted and the elections so conducted as to give every elector an opportunity to register and vote.

DUSTIN, J.; SULLIVAN, J., and WILSON, J., concur.

We concur with the views of the Common Pleas Court of

*Affirming *City of Columbus v. Jeffrey, Mayor, et al*, 2 N. P.—N. S., 85.

1904.]

Franklin County.

Franklin County as to all the questions raised in the hearing before that court.

One new question is presented to this court. It is urged on behalf of the plaintiff in error that the Brannock Law is unconstitutional, because in contravention of Section 1, Article V of the Constitution, which provides that every citizen having the qualifications of an elector shall be "entitled to vote at all elections."

In the provision for elections under the Brannock Law, it is stipulated that "in municipal corporations having registration, only registered voters shall be entitled to vote."

Now it is claimed that there is no provision in the Brannock Law whereby an elector who should move into the residence district wherein a Brannock Law election is about to be held, and become a resident thereof, after the regular days of registration for such election, could be registered and vote, because there is no provision for his obtaining a transfer from his former residence, the election officers therein not being necessarily in session.

We think this point is not well taken, because Section 2926v of the election law makes full provision for such contingencies.

It is suggested in argument that, while Section 2926v may be so construed as to afford every facility for the registration of removals, the secretary of state and the deputy state supervisors have put another construction upon the same, and will issue orders accordingly, thus depriving a removing elector of the right to vote.

This is denied. But, whatever the fact, this court must presume that the election officials will adopt the true construction of the statute and will so conduct the elections as to give every elector an opportunity to register and vote.

The judgment of the common pleas court granting the writ of mandamus upon the mayor of the city of Columbus as prayed for will therefore be affirmed.

James M. Butler, on behalf of the mayor.

Thomas M. Clarke, L. D. Lilley and W. B. Wheeler, for the Brannock Law.

Gumble & Gumble and James Caren, contra.

**PUBLIC CONTRACTS NOT AWARDED TO THE LOWEST
BIDDERS.**

[Circuit Court of Summit County.]

CITY OF AKRON V. OSCAR B. FRANCE ET AL.

Decided, April Term, 1902.

Contracts for Public Work—Bids—Remedy of Lowest Bidder—Where in the Discretion of Public Officials Contract is Awarded to Lowest Responsible Bidder—Lowest Bidder Not Entitled to Damages.

1. Where bids have been invited under Section 794, directing the proper officials in making contracts for public improvements, to award the contract to the lowest responsible bidder, it is within the discretion of such officials to reject any or all bids or to award the contract to one whose bid is not the lowest in price.
2. Mandamus will not lie to compel the award of such a contract to the lowest bidder; the remedy is to enjoin the carrying forward of the work, set aside the contract and to refer the matter back to the officials awarding the contract for further action in accordance with the statute.
3. An action will not lie on the part of the lowest bidder for work thus awarded, for recovery of the amount which said bidder claims would equal his profits had the contract been awarded to him.

HALE, J.; CALDWELL, J., and MARVIN, J., concur.

Heard on error.

The city of Akron, in June, 1898, had taken the necessary steps for improving a portion of Wooster avenue. Through its proper officials it advertised for bids for doing the work. In response to that advertisement there were two bids filed with the city, the plaintiffs proposing to furnish all the material and to do the work for \$19,093.83. McCourt proposed to do the work for \$19,512.21. After these bids were received, the plaintiffs, who were the lowest bidders, ascertained that there was danger of losing the contract, and brought an action in the court of common pleas setting up the proper facts and asked that the city officials be enjoined from awarding this contract to McCourt and be compelled to enter into a contract with the plaintiffs for the doing of the work. The officials were too quick for the officers serving the papers, and before the papers

1904.]

Summit County.

were served entered into a contract with McCourt accepting his offer.

Thereupon the petition was amended and a supplemental and amended petition filed in which allegations are made that the commissioners of the city fraudulently entered into this contract with McCourt to defeat the plaintiffs in their rights, and alleging the facts occurring after the first petition was filed. For some reason trial was delayed for some time, and when the case was heard on the issues made, the court found the fact to be that the plaintiffs were the lowest bidders for the doing of this work and should have been awarded the contract. The court also found that the work had been done by McCourt, that the whole contract was completed, that it had been accepted by the city and paid for, and retained the case for the purpose of assessing damages to the plaintiffs by reason of the plaintiffs having been denied the contract.

The case was continued, and the plaintiffs filed a second supplemental petition in which they allege that the contract had already been completed by McCourt, had been accepted by the city and McCourt paid for it, and there was nothing to be done so far as he was concerned; and asking for damages against the city in the sum of \$5,150; \$5,000 for the profits that would have been made by the plaintiffs if they had been awarded the contract and allowed to complete it and \$150 for some other items. The case then came on for further hearing, issues having been made by answer and reply, and was submitted to the jury for the assessment of damages, the court holding that the court, on the first hearing, had determined the rights of parties.

The precise question here involved has not been, as far as we are aware, adjudicated by the Supreme Court. There are three cases that may have some bearing on the questions here involved: First, the case against the commissioners of Darke county, a mandamus to compel the awarding of a contract for the building of a court house, was sustained by the Supreme Court, but under a statute that required the letting of a contract to the person proposing to build the structure for the lowest price, and the court held that meant a mere matter of mathematics, no discretion lodged with the commissioners, and hence a mandamus

would lie to compel the making of the contract with the lowest bidder, or the party proposing to build it for the lowest price.

Again, in *State v. Marion Co. (Comrs.)*, 39 Ohio St., 188. There was a contention whether the contract—the acceptance of the bid—was governed by a statute which provided for the acceptance of the best and lowest bid or whether it was governed by the old statute requiring the contract to be awarded to the person who would do the work for the lowest price, and the court held that the acceptance of the bid was governed by the statute requiring the bid of the person offering to do the work for the lowest price to be accepted, and mandamus was awarded. But in *State v. Shelby Co. (Comrs.)*, 36 Ohio St., 326, a mandamus was refused under these circumstances. Two bids had been made for the furnishing and placing in place the iron structure for a court house. The lowest bid was accepted, but the party failing to come to time, the second bidder brought suit in mandamus to compel the awarding of the contract to him, and it was held under the statute in force at that time that the commissioners might, in their discretion, reject or accept such bid, and that mandamus would not lie in cases where a discretion is lodged in the tribunal who are to accept or reject the bids.

The statute (Section 794, Revised Statutes) under which these bids were to have been accepted by the city is as follows: None but the lowest and best responsible bid shall be accepted, when such bids are for labor and material separately. But the board of commissioners may, at its discretion, reject all bids or accept any bid which may be the lowest aggregate cost.

So, if we hold that it was discretionary with the commissioners to reject all bids, or enter into a contract with the bidder that would do the work for the lowest aggregate price, then a discretion was lodged in the commissioners, and they could either reject all bids or enter into a contract with the lowest bidder.

When this first petition was before the court an injunction could have been granted against the city from awarding or entering into a contract with McCourt, but we are very clear that mandamus would not lie to compel the commissioners to enter

1904.]

Summit County.

into a contract with the plaintiffs. The only thing that could have been done, if it had been heard upon the original petition, was to grant an injunction against entering into the contract with McCourt, and referring it back to the commissioners to proceed according to the statute and exercise a discretion under the statute required.

When the supplemental and amended petitions were filed, the contract had been awarded to McCourt, and he was entering upon the performance of the contract. The only judgment that could then have been made was to enjoin McCourt from proceeding further with the work, set aside the contract, and refer the matter back to the commissioners to exercise the discretion according to the statute. But after that was done and the supplemental petition was filed, and it appeared that the contract had been completed, no action of the city to enjoin, and no contract to award the plaintiffs, then the only relief was to award the plaintiffs damages if they were entitled to it.

Were they entitled to damages? Upon that exact question there are no adjudications in the state. But we are compelled to hold, as we think, that where there is a discretion in the municipality, or in the commissioners, to reject or enter into the contract in accordance with a bid, that no such right or interest exists in the bidder as to entitle him to maintain an action for damages. It has not gone far enough. So that as this case stood at the time this judgment was rendered, it is very clear that the plaintiffs were entitled to no judgment for damages or otherwise, and instead of rendering the judgment that was rendered, the petition should have been dismissed.

We therefore reverse the judgment of the court of common pleas, and make the entry as indicated.

LOOKING AND LISTENING AT RAILWAY CROSSINGS.

[Circuit Court of Hamilton County.]

**NORFOLK & WESTERN RAILWAY COMPANY v. THE GREAT CHINA
TEA COMPANY and THE P., C., C. & ST. L. R. R. Co.**

Decided, May 11, 1904.

*Negligence—At Crossings over Railways—The Rule as to Looking and
Listening—Applies where the View is Obstructed until near the
Track—Negligence of Railway Company Immaterial where this
Rule is not Observed.*

The rule that a person in full possession of his senses of sight and hearing should exercise them to protect himself and his team from danger when about to drive across a known track of a steam railroad at a street crossing, applies to a condition where the vision is obstructed by a building quite close to the track, and it is negligence on his part which will defeat a recovery for injuries received from a passing train to undertake to drive across without listening and looking along the track at the point from which he could have seen the approaching train. *B. & O. R. R. Co. v. McClellan, Admr.*, 69 O. S., 142, followed.

SWING, J.; DUSTIN, J., concurs; no other judge sitting.

This was an action in the court of common pleas for damages for the killing of two horses owned by the tea company, and also injury to property of the tea company, which resulted from a collision between the horse and wagon of the tea company and the engine of the railway company at a point on the P., C., C. & St. L. Railway Company, at Hazen street in the city of Cincinnati, Ohio. A trial was had in said court, which resulted in a verdict and judgment in favor of the tea company. To this judgment error is presented to this court.

There is very little conflict as to the material evidence in the case. S. B. White was driving a delivery wagon belonging to the tea company, on the tenth day of December, 1901, between 9 and 10 o'clock A. M., and started to cross the said railway company's tracks, going via Hazen street, from Eastern avenue to Gladstone avenue in the eastern part of Cincinnati. The approach to the railway company's tracks on Hazen street was very steep, having a grade of from fifteen to twenty per

cent. The street was not a main thoroughfare, being but little used on account of its steep grade. White testifies that he started from Eastern avenue and drove up Hazen street to a point where the front feet of his horses were in the middle of the north track of the railroad, at which point he stopped and at which point he first saw the engine approaching on said north track, about two hundred (200) feet away. He did not stop on his way up Hazen street, but kept constantly listening and looking for approaching trains.

The evidence is conclusive that White could have seen the approaching train 365 feet away at a point eighteen feet south of the south rail of the north track if he had looked, and it is equally certain that he did not look, for he says that he did not see the approaching train until the front feet of his horses were in the center of the north track, and at which time the train was about 200 feet away. If the front feet of the horses were in the center of the north track, they were, according to measurements, twenty-two and one-half feet from the point where the train could first be seen, and White could not have been more than ten feet back from the front feet of the horses; but say he was twelve and one-half feet back; he was still ten feet nearer the railroad track than the point from which he could have seen the approaching train before he even attempts to look for it. He says he looked and listened, but his own evidence and the undisputed evidence clearly shows that he did not. There is evidence offered by the tea company to the effect that no bell was rung by the railway company. There was also evidence offered by the tea company that the train was running at a very high rate of speed, and these are the acts of negligence which the tea company claims are grounds for recovery. The jury had a right, we suppose, to believe this evidence, but granted that no bell was rung, certainly the noise of the train was present, and could have been heard by White long before he became aware that the train was approaching. It does not appear that any other noises were present to prevent his hearing the approaching train, and while he says that he listened, there is no way to escape the conclusion that he did not. So it seems certain that he neither looked nor listened at

a point where he could have seen and heard the approaching train so as to have avoided the collision.

White was absolute master of his movements; there was no impending danger confronting him, and his horses were entirely under his control, and he voluntarily placed himself in the position where the collision occurred; in doing this he was clearly negligent. It matters not whether the railway company did not ring a bell or was running at a higher rate of speed than twenty miles an hour—which is the usual rate of speed of trains at that point—it is clear that the negligence of the tea company was the cause of the accident, and not the negligence of the railway company.

The evidence does not support the verdict and judgment.

The case, we think, is governed by the decision of our Supreme Court. Law Bull. (December 14, 1903), 958.

Judgment reversed and cause remanded for further trial.

Hollister & Hollister and *W. A. DeCamp*, for plaintiff in error.

Moulinier, Bettman & Hunt, Maxwell & Ramsey and *John R. Schindel*, for defendants in error.

DESCENT OF REAL PROPERTY.

[Circuit Court of Cuyahoga County.]

GEORGE C. OSSMAN ET AL V. MARIA G. SCHMITZ ET AL.

Decided, February 16, 1903.

Deed—Recital of Valuable Consideration—Presumption as to—Brothers and Sisters—Presumption as to Full Blood and Legitimacy.

1. Title comes by purchase and not by gift where the consideration expressed in the deed is a valuable one, and the line of descent can not be changed by showing by parol that the deed was in fact a gift.
2. The presumption as to brothers and sisters is that they are brothers and sisters of the full blood and legitimate.

WINCH, J.; MARVIN, J., and HALE, J., concur.

Error to the court of common pleas.

1904.]

Cuyahoga County.

April 3, 1875, Christian Ossman was the owner of certain real estate in the city of Cleveland, which, on said day, he conveyed by warranty deed to one Herman Stuhr. The consideration in the deed was recited to be \$10,000. On the same day said Herman Stuhr conveyed said premises to Christina Ossman, wife of Christian Ossman, by quit-claim deed, in which the consideration was recited to be two dollars. Both deeds were in the ordinary forms, and were duly recorded on the same day. Christina Ossman died intestate and without issue, leaving no husband surviving her, in September, 1896, seized of the premises in question.

Defendants in error and certain cross-petitioners claim title to the property, under the third paragraph of Section 4159, Revised Statutes, as the brothers and sisters of Christina Ossman of the whole blood and their legal representatives.

Plaintiffs in error at the trial in the court below claimed and offered to prove that the two deeds above referred to, although they recited money considerations, were in fact deeds of gift; that by them it was clearly the intent and purpose of the husband to make a gift to his wife, and that he took this means of presenting her with the property, being advised thereto by counsel; that the wife died intestate and without issue, possessed of this property which came to her from a former husband by deed of gift, and that it therefore descends under Section 4162, Revised Statutes, she leaving no children or their representatives, one-half to the brothers and sisters of the wife (the defendants in error), and one-half to the brothers and sisters of the husband (the plaintiffs in error).

The trial judge excluded evidence tending to show that the deeds referred to were in fact without consideration, although they recited it, and were intended as a gift from the husband to the wife. In this we think there was no error.

"Where the consideration expressed in a deed of conveyance is a valuable one, the title comes by purchase, and it is not competent to show by parol that in fact the title came by deed of gift, and thereby change the line of descent." *Groves v. Groves*, 65 Ohio St., 442.

Defendants in error, to prove their descent and that they were the brothers and sisters of Christina Ossman, of the whole blood.

and their legal representatives, took certain depositions in Germany, and error is alleged in overruling certain exceptions to these depositions.

It appears that written exceptions specifying the grounds of objection were filed on September 20, 1900, and on motion of the defendants were heard and overruled on October 16, 1901, by the common pleas judge sitting in room No. 1. To this ruling defendants excepted, but took no bill of exceptions. What facts were before the court at that time do not appear. It is true, an envelope said to have contained the depositions is attached to the final bill of exceptions, but there is no evidence to show that said envelope was before the judge who ruled on the exceptions. We can not, therefore, say that any error was committed in overruling said exceptions. *Shamokin Bank v. Street*, 16 Ohio St., 1.

When the case finally came on for trial in March, 1902, defendants again excepted to the depositions, but said exceptions were overruled and properly, we think. The matter was *res adjudicata*.

Plaintiff in error further claims that the evidence does not show that defendants in error are the legitimate heirs of the full blood of Christina Ossman. The testimony is to the effect that they are brothers and sisters of Christina Ossman and their legal representatives, and in the absence of any proof to the contrary, we think the fair presumption to be that the brothers and sisters were of the full blood and legitimate.

Judgment affirmed.

Popleton, Billman & Billman, for plaintiffs in error.

Beavis & Johnson and Kline, Carr, Tolles & Goff, for defendants in error.

RIGHTS OF A DROVER RIDING ON A FREIGHT TRAIN.

[Circuit Court of Cuyahoga County.]

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY V. SAMUEL C. HOTCHKISS.*

Decided, January 26, 1903.

Carriers—Drover Traveling on a Freight Train—Is a Passenger While Walking Along the Tracks to Reach the Caboose—Degree of Care Required in so Doing—Negligence in Operating Trains.

1. One traveling on a freight train in charge of live stock is a passenger although paying no fare in addition to the freight charges on the stock, and is entitled to protection from injury while walking along the track at the direction of one of the company's agents to reach the caboose.
2. Where such a passenger is injured while thus attempting to reach the caboose, questions as to his own negligence and that of the railway company should be submitted to the jury.
3. Failure upon the part of one thus walking along the track to use ordinary care in keeping out of danger would constitute contributory negligence.

MARVIN, J.; CALDWELL, J., and HALE, J., concur.

Error to court of common pleas.

The parties in the court of common pleas were the reverse of what they are here. In this opinion the terms plaintiff and defendant refer to the parties as they were in the court of common pleas.

On August 19, 1899, the plaintiff made a contract with Thomas M. King, receiver of the Pittsburg & Western Railway Company, he being in the operation of the road of said company, by which two carloads of live stock were to be transported for the plaintiff from Middlefield, in Geauga county, Ohio, to East Buffalo, in the state of New York, over the road operated by said receiver and connecting lines. The only connecting line over which this stock was to be transported was the line of the defendant. The contract, among other things, had the following provisions:

*Affirmed by the Supreme Court without report, December 1, 1903.

“That whenever the person or persons accompanying said stock under this contract to take care of the same shall leave the caboose and pass over or along the cars or track of said carrier, or connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract.

“And it is further agreed by said shipper that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier, or its connecting carriers, without charge other than the sum paid or to be paid for the transportation of the live stock in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier, from all claim, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier or any of its or their employes or otherwise.”

The two cars were loaded with live stock at Middlefield on said August 19, and on the morning of August 20, about three o'clock, the train, of which said cars formed a part, reached Painesville, on the line of the defendant, where the cars were to be taken into a train on the defendant's road. The plaintiff accompanied these cars and was to go on with them in charge of said live stock to their destination at East Buffalo. The plaintiff went to the station of the defendant and reported his cars as having arrived, and a locomotive engine of the defendant was sent out to switch these two cars onto the defendant's line of road and connect them with a freight train to go east on its line. To get to that part of the defendant's line of road where these cars were to be attached to the east-bound train of the defendant a considerable distance had to be traveled, and, at the invitation of the engineer of the locomotive which did the switching, and which was the locomotive which was to haul the train east, the plaintiff rode with the engineer on the engine. This same engineer remained with the engine to take the train east.

When the cars containing the plaintiff's live stock were properly in the defendant's train, the engineer stated to the plaintiff that he must now go back to the caboose of that train to ride. The defendant's line has a double track. The trains going to the east use the northerly and those going west the southerly track. The plaintiff, upon receiving this notice from the engineer, alighted from the locomotive on the north side, passed around in front of the engine to the south side, and there had a conversation with the engineer, the substance of which was that as this train contained some sixty cars, it was a long distance to the caboose, and he cautioned the engineer not to start his train until he (the plaintiff) should have time to reach the caboose. To this the engineer replied that if he did start the train he would wait until the plaintiff had nearly reached the caboose, and would then start so slowly that he would have no difficulty in getting upon the car.

The distance between the north rail of the southerly track and the south rail of the northerly track was the usual distance of about seven feet. Between these tracks was a hard, good path for walking and one which those employed about these yards were accustomed to use. On the north side of the north track the condition of the ground was much less favorable for walking, though one could without very great inconvenience walk along on the north side. The plaintiff started west toward the caboose, on the south side of this train, between the two tracks. If freight cars were standing on each track opposite to each other, the distance between the cars would be about forty-seven inches. The engineer knew that the plaintiff had taken this pathway between the two tracks for the purpose of reaching the caboose. From the point where this engine stood one could see to the east along the tracks for a long distance. There was no west-bound train coming in sight of the plaintiff when he started to walk toward the caboose. When he had gone some distance to the west, perhaps half-way from the engine to the caboose, a freight train coming from the east at from thirty to thirty-five miles an hour came in sight of the engineer of this east-bound train. The plaintiff, hurrying on to take his place in the caboose, did

not look around to see whether anything was coming on the south track. When, however, he had got within three or four cars of the caboose, he heard some unusual noise, and looked over his shoulder and saw the west-bound train coming at a distance, as he thinks, of from seventy-five to one hundred feet from him. Of course, this estimate is necessarily somewhat indefinite. At this time the east-bound train, which he was to take, was moving slowly, the engineer having just before started, as he had said to the plaintiff that he would. The plaintiff hurried on toward the caboose, and just before reaching it was struck by a car in the west-bound train and injured. He brought suit against the defendant to recover damages for this injury, charging that such injury was due to the negligence of the defendant in starting its east-bound train while he was in and known to be in a perilous position, where he would be likely to be injured if the train started.

The trial of the case resulted in a verdict for the plaintiff. Motion for a new trial made by the defendant was overruled, and after a remittitur of a part of the damages allowed by the jury, judgment was entered for the plaintiff against the defendant for the balance. The present proceeding is brought for the purpose of reversing that judgment.

On the part of the defendant it is urged that it was not an act of negligence on its part to start its train as it did, and that, even if that were negligent, the plaintiff contributed by his own negligence to the injury which he received in not keeping a lookout for trains on the southerly track, and that it was negligence on his part not to have gotten out of the way of the west-bound train after he saw it.

The question of the relative duties of the plaintiff and the defendant depends largely upon the relation which at the time they sustained to each other.

It is conceded by the defendant that if the plaintiff was then a passenger upon its road, its duties would be very different from what they would be were he but a licensee, which, it is urged, he was at that time, and in support of this contention attention is called to the language of the contract, in which it is provided that "whenever the person or persons accompany-

1904.]

Cuyahoga County.

ing said stock under this contract, to take care of the same shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause," etc.

Whether this clause of the contract could in any wise affect the right of the plaintiff to recover if this accident had happened at some point on the defendant's line where the plaintiff had alighted from the caboose and gone along the track to look after his stock or not, we think it does not affect his right to recover under the circumstances of *this* case. The plaintiff had not yet reached the caboose, where he was to ride. He was on his way to get on board of the train, and, as we think, was entitled to the rights of any passenger of the railroad company.

In the case of *Cleveland P. & A. Ry. Co. v. Curran*, 19 Ohio St., 1, it is held that one traveling on what is designated a "drover's pass," and which, together with the contract for the transportation of live stock, constituted the contract between the shipper and the railroad company, was a passenger of the railroad company both in going with his stock and in returning on another train. And in the same case it is held that a provision in the contract between the shipper and the railroad company which is, if not in exactly the same words, surely in substance the same as the last clause heretofore quoted from the contract in *this* case, is void as against public policy. This last doctrine has been repeatedly affirmed by our Supreme Court. See *Union Express Co. v. Graham*, 26 Ohio St., 595; *Cincinnati, H. & D. Ry. Co. v. Pontius*, 19 Ohio St., 221; *United States Express Co. v. Backman*, 28 Ohio St., 144; *Telegraph Co. v. Griswold*, 37 Ohio St., 301.

In the case of *Chicago & A. Ry. Co. v. Winters*, 51 N. E. Rep., 901 (175 Ill., 293), it is said, in the second clause of the syllabus:

"The relation of carrier and passenger still exists when a passenger is obliged to alight from a car to go to another car, to be carried by the carrier to his destination."

And the third clause reads:

"A stockman traveling with the consent of the railroad company on a freight train, in charge of stock carried by the company for him, is a passenger."

Unless, then, in this case the defendant exercised that care for the protection of the plaintiff which it owed to its passengers, it was negligent, and, under proper instructions, it was a question for the jury to determine whether it did exercise such care.

In the case to which attention has last been called, the fourth clause of the syllabus reads:

“Where a train has reached a point where the passenger may lawfully leave it, and no direction is given him to alight on the side of the train where there is no danger, but he is permitted to alight on the side where there is danger, it is for the jury whether reasonable care for the safety of the passenger has been used by the railroad company.”

Attention is called to the case of *Railroad Co. v. Perry*, 58 Ga., 461. In this case the plaintiff had purchased a ticket from the railroad company at Macon, entitling him to ride on the train of the railroad company to Savannah, both in the state of Georgia. He, after having purchased the ticket, fell into conversation with a friend in the car shed near the ticket office. The train, at its proper time, started out without his observing the signals. Noticing that the train had started, however, he started in pursuit, being very near to the train. An engine standing on a track which led onto the tracks on which the train was, had waited for the train to pull out and then started up, as it had a right to do, and the plaintiff came in contact with that engine and was injured. The court say, on page 468, in the fifth subdivision of the opinion:

“It is for the jury to say whether the danger of pursuing and boarding a train when in motion was, under the circumstances, so apparent as to make it the duty of the passenger not to undertake it, or to desist from the attempt before he was injured.”

In the present case we think the facts are not such as would warrant a court in saying, as matter of law, either that the defendant was without negligence in starting its train, or that the plaintiff was guilty of such contributory negligence as to bar a recovery. Without doubt, the danger to the plaintiff in being between the two trains was greatly increased by the start-

1904.]

Cuyahoga County.

ing of the east-bound train. Had that train remained standing, with the space of forty-seven inches between its cars and those of a swiftly moving train going west, it would have enabled him to lean against or hold onto the cars of the north train, and so avoid danger. There can be no doubt that the engineer of this train on the north track knew before he started his train that the other train was coming rapidly from the east. He knew also that the plaintiff had started down the pathway between the two tracks on his way to the caboose, and must have known that if the west-bound train passed him while he was thus between the tracks and while his own train was in motion, he would be in a highly dangerous position. Perhaps he might have thrown himself upon the ground and thereby have escaped injury. It is possible that after he knew of the approach of the west-bound train he could have crossed the southerly track and got out of the way of danger, yet this last is very doubtful, and it is not probable that a cautious man would have risked it, and it is very doubtful whether, in the very short space of time in which the plaintiff must have determined what to do, it would have occurred to the average prudent man to throw himself upon the ground.

The duty of a railroad company to its passengers requires a very high degree of care on the part of the company. In the case of *Wabash Ry. Co. v. Skiles*, 64 Ohio St., 458, Judge Davis, in his opinion at page 471, uses this language:

“It has been laid down as the law that passengers who are required to cross railroad tracks in getting upon or alighting from trains, have the right, from the nature of their contract, to expect a safe place for that purpose, and may govern themselves accordingly.”

Attention is called to the case of *Baltimore & Ohio Ry. Co. v. State*, 32 Atl. Rep., 201 (81 Md., 371), a case decided in the court of appeals of Maryland in 1895. In this case the party injured was not a passenger, but had alighted from one train and was taking the usual course to the ticket office of the B. & O. Railroad Company to purchase a ticket from East Brunswick to Washington. This language is used, on page 203, in the opinion:

“He took the same route to the ticket office as that pursued by other passengers and certain employes of the appellant. He was not required, under the circumstances of this case, when he reached the track, to ‘stop, look and listen.’ This rule is not one of universal application except in cases when it is applied to public road crossings.”

In the case of *Railroad Co. v. State*, 63 Md., 135, the party injured had purchased a ticket at the station, and, in order to take her train, she was required to cross the railroad track to reach a platform on the opposite side of the track from that on which was the station or ticket office. She had not yet got upon any car of the company, but it was held that she was a passenger entitled to all the protection of a passenger, and further, it was said, on page 144, in the opinion:

“If she had purchased a ticket and was crossing the track by and under the direction of the ticket agent for the purpose of taking the train, she is to be considered as a passenger, and as such entitled to the rights and protection of a passenger, and it was the duty of the agent, so far as human care and prudence could, to guard against exposing her to danger.”

Under the authorities to which attention has been called, and many others to the same effect, we think it clear that the defendant was not entitled to a direction to have a verdict returned for it; and this disposes of the first exception taken to the refusal of the court to charge as requested by the defendant.

Exception is taken to the refusal of the court to charge a considerable number of requests made by the defendant. The first of these, which was that the jury be directed to return a verdict for the defendant, was, as has already been said, properly refused. The second request reads:

“If the court refuse defendant’s first request to charge, then defendant requests the court to charge the jury that under the circumstances of this case, plaintiff, while passing over and along the tracks of defendant, was not a passenger; and that in the conduct and management of its road and trains it was not bound to anticipate plaintiff’s presence at the place mentioned in the petition, nor to modify its usual and customary methods of maintaining and operating its railroad on account of his presence in that place.”

What has already been said in this opinion necessarily results in holding that this request was properly refused. Complaint is further made that the court refused to give in charge the fifth request of the defendant. That request reads:

“If the court refuse defendant’s first request to charge, then defendant requests the court to charge the jury that if they find that plaintiff made a contract, by the terms of which he was permitted to ride upon the freight train of defendant in charge of his stock, upon certain conditions, among which were the following:

“‘That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock, to take care of the same under this contract.’ And if you shall further find that plaintiff was in fact passing over or along defendant’s track at the time of the injury complained of, he did so at his own risk of personal injury from whatever cause. And defendant owed him no duty except after becoming aware of his dangerous position to refrain from wantonly or wilfully injuring him.”

There was no error in refusing this request. The views of the court in regard to it are expressed in what has already been said in this opinion.

Requests seven, eight and nine each bear upon the question of the care which the plaintiff was bound to exercise, and put upon him the same care which would have been required of him had he been a licensee of the defendant instead of a passenger. Holding, as we do, that he was a passenger of the railroad company, the court properly refused these requests. The eleventh request reads:

“If the court refuse defendant’s first request to charge, then defendant requests the court to charge the jury that if you shall find that plaintiff saw or heard the train coming on the south main track in time to have stepped across it and from the space between the main tracks, but tried to get to the caboose in ad-

vance of the oncoming train, then he assumed the hazards and perils of such a course and he can not recover from defendant any damages he may have sustained by reason of his action."

This request was properly refused. In the main, it states a proposition which should have been given, but if this had been given, it would have put upon the plaintiff the obligation of determining whether he could pass to the south and across the south track to a distance far enough from the track to be safe after he knew of the coming of the train. It is certain that the time after the plaintiff knew of this coming train and the time it reached him was very brief. To say that he must have determined at once that he could get across, and if, as a matter of fact, he could, although to all appearances it was very doubtful whether he could, would be to require more of this man than can be expected of an ordinarily prudent man. If he could have thus got across, and if it was so plain that he could have thus got across that a prudent man would have risked it, then it might well be required that he should have thus got across; but in a case where it is so doubtful whether he could have made it, to say that if he possibly could he must have done it, is to require more prompt judgment than the law requires of the ordinarily prudent man.

The twelfth request reads:

"If the court refuse defendant's first request to charge, then defendant requests the court to charge the jury that it is no excuse for the plaintiff that he was afraid that he might lose the train on which he was about to go, and that the fact that the train on the north track was moving and he was apprehensive that if he stepped across the south track and from between the main tracks, he might lose his train, this would not justify him in remaining in such a perilous place."

We think there would have been no error in giving this request and it would not probably have misled the jury, yet perhaps it is putting it stronger than it should be to say that the facts suggested would be no excuse for the plaintiff, though certainly it is true that they would not justify the plaintiff for remaining in a perilous place. The court, however, charged the jury on the subject of this request, and, as we think, fully

1904.]

Cuyahoga County.

covered the proposition and correctly stated the law to the jury. On pages 154 and 155 of the record this language is used in the charge:

"I say to you further that, though you may find the company was negligent in directing or permitting, with its knowledge, if you find it had the knowledge, the plaintiff to walk between the tracks in going to the caboose, and that he was thus put in a place of danger, it would yet be the duty of the plaintiff, upon discovering that he was in a place of danger, to exercise ordinary care to prevent injury to himself; and if the plaintiff (after the discovery that he was in a place of danger) failed to go to a place of safety, if there was reasonable opportunity to find a place of safety, this would be such contributory negligence as would defeat his recovery."

Complaint is made to the charge of the court, and especially to this language used in the charge.

"It is contended by plaintiff that even though it might have been a safer course to have gone on the outside of the tracks instead of between the tracks to reach the caboose, that the defendant, through its agents, knew in ample time of the imminent danger of plaintiff to have obviated the danger and injury to plaintiff. In this connection I say to you that, though the plaintiff may have put himself in a place of danger negligently, yet if the defendants, through its servants and agents, apprehended, in time, the dangerous position of plaintiff, by the exercise of ordinary care, to have prevented the same, it was the duty of the company through its agents to do so, and that if the company, by the exercise of ordinary care, after such discovery, could have saved plaintiff from the injury, then the failure of the company in this respect would be the proximate cause of the injury, and the negligence of the plaintiff would not, under such circumstances, bar his right to recover."

If this language was so used as to be understood by the jury as meaning that though the negligence of the plaintiff continued up to the instant of his injury, still he might recover if the defendant was negligent, it would have been erroneous, but, taken in connection with the language immediately following, which is that heretofore quoted from the charge, and together, the law is stated as we hold it to be. The court distinctly stated that if the plaintiff, when he knew of his danger,

failed to exercise proper care to save himself, he could not recover. We find nothing in the charge of the court as given, or in the refusal of the court to charge as requested, or in the facts of the case, to justify a reversal, and the judgment of the court of common pleas is affirmed.

Brewer, Cook & McGowan, for plaintiff in error.

Kline, Carr, Tolles & Goff, for defendant in error.

ACTIONS FOR MALICIOUS PROSECUTION.

[Circuit Court of Lorain County.]

FRANK LIEBLANG V. THE CLEVELAND ELECTRIC RAILWAY CO.

Decided, October 8, 1903.

Malicious Prosecution—Termination of Prosecution Necessary to Sustain Action for—Denial of Knowledge of Entry of Nolle Prosequi—Puts Plaintiff upon Proof that the Case is Ended—Pleading.

1. In an action for malicious prosecution, an allegation that the case was ended by a *nolle prosequi*, and a denial by the defendant for want of knowledge that the case was thus ended, raises the issue as to its termination, and puts the plaintiff upon proof as to his final discharge, and if such proof is lacking there can be no recovery.
2. The fact that a final termination of the prosecution was assumed and not denied during the trial does not supply the place of such proof, particularly where the trial judge directs attention to this defect in proof by sustaining an objection to a question on the ground that such proof is lacking.

MARVIN, J.; HALE, J., and WINCH, J., concur.

The case of Frank Lieblang against The Cleveland Electric Railway Company is brought here upon proper proceedings for a review, complaint being made by Lieblang, who was the plaintiff below as well as the plaintiff in error, that error to his prejudice was committed by the trial court upon the trial.

The suit was brought for malicious prosecution. The petition set out, stating it briefly, that The Cleveland Electric Railway Company conspired with The Citizens Electric Rail-

way Company of Detroit and certain natural persons in the city of Detroit to have Lieblang arrested upon a false charge in Detroit, and prosecuted him upon such false charge; that he was arrested; that he was in jail for several days, and that for many months he was under bond and required to appear and did appear a good many times in the city of Detroit, and that he was thereby greatly injured. The petition further states as was clearly necessary that the prosecution in Detroit against him was terminated, and he states that the case or persecution was terminated by a *nolle* being entered by the prosecuting attorney with the permission of the court.

The answer denies that The Cleveland Electric Railway Company was in anywise responsible for the arrest of Lieblang, and denies for want of knowledge that the prosecution begun in Detroit was terminated at the time the suit was brought; that raised the issue squarely, and put the plaintiff upon proof that the prosecution in Detroit was ended.

It is settled without any question in Ohio that before a suit can be brought for malicious prosecution, the prosecution must be ended, and must have ended either by an acquittal of the accused or by a dismissal of the prosecution. The last case to which our attention has been called on that subject is in the 55th Ohio State Reports, page 156 (*Douglass v. Allen*).

“In order to maintain an action for malicious prosecution, it must be shown that the prosecution was legally terminated before the commencement of the action; but it is not essential that the plaintiff shall have been acquitted of the charge on a trial of the merits; the entry of a *nolle prosequi*, followed by his discharge is sufficient.”

Prior to that the court had said in another case, that of *Foreman v. Rotier*, 8th O. S., page 550, that the prosecution must have ended by an acquittal of the accused; but in that case that question was not raised, and was only incidentally stated. But in the case last referred to in the 56th, Judge Williams says: It is not necessary, clearly ought not to be necessary that the case should be terminated by an acquittal; because if that were true, and there was a *nolle* entered, it would leave the party remedyless, although he had a good

case, although he had thus been wrongly dealt with. Attention was called to this in the argument of the case in this court by counsel for the defendant in error.

Counsel for the plaintiff in error was inquired of if there was that defect in the evidence, and he answered he did not think that there was any direct proof of the prisoner's discharge or plaintiff's acquittal, but that that was conceded. Every body assumed that that was so, overlooking the fact that in the trial his attention was called to it. A good many questions were asked by counsel for the plaintiff of the plaintiff when he was upon the stand. Questions which assumed he had been discharged. One if them is found on page 122.

"Q. From the time of your arrest on the 31st day of August 1900, until the time of your final discharge on the 2d of July, 1901, you may state to what extent by your travels hither and thither and your imprisonment your business was interfered with?"

Now a good many questions of that sort were asked, and objections to them sustained, and the court on page 124 called attention of counsel to the fact he was assuming that there was a final discharge of the plaintiff from the prosecution in Detroit, and said:

"The question has in it," speaking of a question to which an objection had been made, and which was then being considered, "The question has in it, 'And your final discharge;' you are assuming a thing that ought not to be in your question. Now I hold that the time that he spent in Detroit in the court—you may show whose transactions, how long he was before the court, in the court room, the incarceration, in the hands of the officers, any of those things. I suppose you had covered all of that."

Calling his attention to the fact the only defect in his question he was asking was, he had failed so far to show any discharge or termination of the prosecution in Detroit. And still after a careful search of this record all through we can find nothing which squints toward that fact. The nearest is the assumption by counsel for plaintiff that he was finally discharged, and he was cautioned he must not ask that be-

1904.]

Lucas County.

cause of the fact he failed to show it. And still the case went through and he did not show and so far as we can find there was no effort to show there was a final discharge. That being true, it is not necessary to comment upon what the court said below, and the reasons why he took the case from the jury. It is enough to say he was justified in taking the case from the jury, for there could have been no verdict that could have been sustained for the plaintiff; there was not a scintilla of evidence upon this material point, that the prosecution was ended. That being true, without any discussion of the further questions, although in examining this question we have had to look the record through, and learned pretty nearly what there is in that record, but without any discussion as to any other question, that was fatal to the plaintiff's case and justified the court in directing a verdict for the defendant, and the judgment is affirmed.

Kerruish, Chapman & Kerruish, for plaintiff in error.

Squire, Sanders & Dempsey, E. G. Johnson and Hale C. Johnson, for defendant in error.

BENEFICIAL INSURANCE.

[Circuit Court of Lucas County.]

ELIZABETH CROCKETT V. ORDER OF THE RED CROSS ET AL

Decided, January Term, 1903.

Mutual Benefit Societies—Requisites of Notice of Assessment—Rights of the Beneficiary.

1. Where a provision of the constitution of a beneficial order requires that there should be actual notice to members of the levying of an assessment, such notice must be in fact given to a member before forfeiture of his rights will result from failure to pay the assessment, notwithstanding a rule of the order that a member becomes suspended *ipso facto* from all benefits of the beneficiary fund by failure to pay an assessment.
2. A beneficiary of such an order can not be deprived of his rights under the certificate by the fact alone that the policy holder became dissatisfied with the order and declared his intention to withdraw and pay no further assessments.

PARKER J.; HAYNES, J., and HULL, J., concur.

This case comes into this court on appeal. The plaintiff says that the defendants named (The Order of the Red Cross; The Knights of the Red Cross; The Subordinate Commandery, known as The Toledo Commandery No. 4, Order of the Red Cross, and The Knights of the Red Cross) are corporations under the laws of Michigan and Ohio; that the business of the companies is chiefly fraternal insurance—class insurance, as distinguished from the old line method of insurance; that James K. Crockett in his lifetime was a member of all the associations named, by virtue of his membership in the Toledo Commandery No. 4 of the order; that on September 24, 1888, the order issued to him a beneficiary certificate for the sum of \$1,000, payable to the plaintiff, as beneficiary, upon the death of the insured, if he should comply with the rules of the order with respect to the payment of assessments and otherwise hold and keep himself in good standing in the order; that he complied with all these requirements, and was in good standing at the date of his death, which occurred on September 23, 1900; but that the defendants refused to recognize her claim under this certificate, and therefore she prays that they may be compelled to levy, collect and pay over to her such assessments as will make up to her the amount promised in the policy, to-wit, \$1,000.

Various issues presented by the answer have been eliminated during the trial of the case, so that the only issue remaining is that presented by the averment of the answer, that the rules of the order required that:

“All assessments must be paid on or before the twenty-eighth day of the month, and any member failing to pay the assessment by midnight of the date for which the assessment is called, becomes thereby *ipso facto* suspended from all benefits of the beneficiary fund of the order; that on or about the first day of August, 1900, two assessments were levied and called for under said revised constitution and laws, and that notice, as provided under the laws of said order, was mailed to each and every member of said The Order of the Red Cross and Knights of the Red Cross and to the said James K. Crockett; that the said James K. Crockett failed to pay said assessments on or before midnight of the twenty-eighth day of August, 1900, and became

1904.]

Lucas County.

thereby *ipso facto* suspended from all benefits of the beneficiary fund of said order."

It will be observed that the answer does not contain an averment that this notice was in fact *served* upon James K. Crockett or that he ever received it, nor does it advise us who it is claimed mailed the notice to him. To the answer and supplemental answer a reply was filed by the plaintiff. I read from the reply:

"Plaintiff says that she denies that deceased ever received any legal notice of the pretended assessment made payable August 20, 1900, and denies that any such notice was ever issued to the deceased."

In so far as the denial of the receipt of the notice is concerned, it is a denial of something not averred in the answer; but the case has been tried as if the issue were presented here whether the notice if issued and mailed was ever received by James K. Crockett in his lifetime. It appears that in the course of the business of the order, it was customary and perhaps required that a notice should be issued on the first of each month of the assessments payable upon the twenty-eighth of the month, and a notice, as averred in the answer, was issued upon August 1, 1900, calling for the payment of assessments Nos. 28 and 29, payable August 28, 1900, and another notice was issued upon September 1, 1900, calling for assessment No. 30, payable September 28, 1900; Mr. Crockett having died upon September 23, 1900, the notice of September 1, 1900, was the last one issued before his decease. According to the testimony of his wife, the notice of September 1, 1900, was found among his paper after his decease. The notice of August 1, 1900, was not found there, and she seems to have had no knowledge of it. The testimony shows that Mr. Crockett was rather lax and dilatory about paying his assessments; that he had not been in the habit of paying promptly; that he had paid some days after the time fixed for payment, to-wit, the twenty-eighth of the month, on a great many occasions during the continuance of his membership in the order. Among the laws of the order, printed in a little book containing the revised constitution and laws of the order intro-

duced in evidence, Section 11, appearing at page 77 of this book, are the provisions:

"All assessments must be paid on or before the twenty-eighth day of the month, and any member failing to pay the assessment by midnight of the date for which the assessment is called, becomes thereby *ipso facto* suspended from all benefits of the beneficiary fund of the order." * * *

Section 12 on page 78 provides:

"Members who become suspended for the non-payment of dues and assessments may be reinstated upon compliance with all of the following conditions, and not otherwise, to-wit: By the payment of all arrears for which they become suspended, and all dues and assessments which have subsequently become payable, and upon the consent of a majority of the members of the commandery to which the said suspended member or members belong. Provided also, that no reinstatement shall take effect until the supreme treasurer's receipt for the arrears has been received by the commandery, and a notice thereof received by the supreme scribe. Members who are suspended for a period of one month and less than three months shall be required also before being reinstated to sign a certificate of good health, in form as follows:

"To the Supreme Commandery of the Order of the Red Cross and Knights of the Red Cross:

"I, _____, to whom was issued beneficiary certificate No. — as member of _____ commandery _____, having been suspended from all rights, benefits and privileges of the order by reason of —, and desiring to be reinstated in the order, do hereby certify that I am at this date in sound bodily health, and I agree that my reinstatement shall be valid and binding only upon condition that this statement is true in every particular.

"Signed _____

"Attest Hall of _____, Commandery No. _____

"This is to certify that _____ was duly reinstated by a vote of this commandery on the night of _____ 18—.

"_____ Scribe.

"Section 13. Members suspended from the beneficiary fund of the order for a term exceeding three months, shall again be obliged to undergo a medical examination upon the prescribed form of the order, which must be approved by the supreme medical examiner. They shall then receive a new beneficiary certificate, and be in every way received as a new member."

1904.]

Lucas County.

It appears that Mr. Crockett had never been in arrears for as much as thirty days, and that by paying his arrearage in each instance to the treasurer of the local commandery, he was regarded and treated as reinstated; and that seems to have been the universal practice so far as this local commandery was concerned. If a member was not as much as thirty days in arrears, all that was required was that he pay his arrearage; thereupon he was restored to good standing. The provision that the suspended member must pay all dues and assessments, and also obtain the consent of a majority of the members of the commandery to which he belonged, must be construed in the light of this custom, and the construction, in view of this practice, that we give to this provision is, that the member obtains the consent of the membership of the local commandery to his reinstatement by paying his dues and assessments within thirty days to the treasurer, and no formal action of the body denominated the local commandery, in session, is required. It will be observed that the assessment in question being payable upon August 28, 1900, and Mr. Crockett having died upon September 23, 1900, he was not more than thirty days in arrears at the time of his decease, and that he was in position to have become fully reinstated merely upon the payment of the double assessment of August to the treasurer of the local commandery, even if he had been duly served with notice of the August assessments.

It appears from the evidence that Mr. Crockett, during the month before his decease, had expressed some dissatisfaction with the treatment he had received at the hands of the order, and some dissatisfaction with these double assessments that had been coming in from time to time, "double headers," as he called them; that when they came in at the rate of two per month, he seemed to think they were too much of a burden, and he expressed dissatisfaction and an intention to quit the order and not pay any more. This mere expression of a purpose to quit the order, while proper evidence in the case on certain issues presented, would not of itself deprive him or the beneficiary of the rights they might have under the certificate.

The real questions in this case, and the only important questions, as we view it, are, first, the question of fact whether Mr. Crockett received the notice of August 1, 1900; and second, the question of law whether the actual receipt of the notice by him was necessary in order to place him in default, so that he might be deprived of the benefits accruing to a member. I will first discuss the question of law that I have mentioned as being involved. Section 77 of the constitution, appearing at page 55 of this book, provides the method of service of notice through subordinate commanderies until an official journal shall be published, and that thereafter:

“Assessment notices shall be printed therein and a copy of said journal sent direct from the office of publication to each beneficiary member of the order, which shall be in every way a legal notice of assessments, and no other notice shall be given to members.”

To the same effect is Section 10 of the laws, appearing at pages 76 and 77 of the book of laws. Now it appears that after this provision was adopted as part of the law of the order, an official organ of the order was published, and that thereafter that official organ containing notices of the assessments was sent out to the members, and that that was the only mode of service of notice of the assessments. It will be observed that this law does not state how this official organ is to be sent out, or by whom; that is not provided for; but it is provided that it is to be sent direct to the member. A construction of this provision that would make the simple mailing of the notice without evidence of its receipt by the member sufficient to put him in default, so that his rights as a member would be *ipso facto* suspended or terminated, would not be consistent with the general principles governing notices as a predicate of a forfeiture, and would not be favored by the law. Such notice could not well be regarded as being sent *direct* to the member, if it had been merely started on its way *toward* him through the mails as second class matter; and the course pursued by this order seems to have been to mail this official paper of the order to the members as second class matter. A provision of the constitution, preceding this as to the sending out of the

1904.]

Lucas County.

official organ of the order, requires that the financier of the local organization "shall *notify* all members of the assessments and when in arrears for dues." The provision in the by-laws as to the form of the notice is as follows, Section 10, page 76:

"Whenever the supreme scribe forwards notices of assessments to the subordinate commanderies, the scribe thereof shall impress the seal of the commandery on said notices and deliver them to the financier for distribution, at the same time notifying the supreme scribe of the date of such delivery."

This provision of the constitution as to the financier notifying the members, we have no doubt requires actual notice to the members, and we can not believe that the mere mailing of the official paper of the order when it was published was intended to be a substitute for the actual notice to the member. We think rather that while the method of notification was to be changed, the very gist and spirit of the provision that the members were to be notified was not affected by the adoption of this new method.

A resolution was subsequently adopted by the order with respect to the manner of serving notices, which was to take effect after July 1, 1899, and we think that this resolution is to be regarded as part of the law of the order in force upon that subject at the time this notice of August 1, 1900, was sent out and thenceforward; therefore it is applicable to the case in hand. Thereafter notice through the *Gazette*, the official organ, was not requisite or proper. The resolution is as follows:

"Resolved, That the *Gazette* be discontinued and assessment notices be mailed direct to each member of the order in folder form by the supreme scribe, commencing July 1, 1899."

The folder was to be thereafter sent out as a substitute for the notice provided for in the *Gazette*. While the provision was not clear as to how the official organ was to be sent out, or by whom, this resolution provides explicitly that the folder is to be sent out by the supreme scribe and is to be sent by mail. Whether this provision was intended to be regarded by the order as the only notice to be sent out—whether no other notice was to be given to a member is not clear. It seems to

us that the laws of the order are hardly capable fairly of a construction that this folder notice is to be the only notice to be sent to a member; that the mailing of such a notice is to answer all the purposes of a legal and valid notification to the member of his assessments. We are rather of the opinion that after the adoption of this resolution the provision that the financier of the subordinate commandery should *notify* the members of assessments by the distribution to them personally of notices under seal was revived, and that the folder notice to be mailed by the supreme scribe was an additional notice, not dispensing with the actual notice that is to be given by the financier of the subordinate commandery. I say that is our construction of the laws after the adoption of this resolution. That is our view of the effect of the adoption of that resolution. But the order seems to have acted upon the other theory of construction, namely, that the folder notice sent out by the supreme scribe was to fulfill all the requirements of a notice. Assuming that the construction put upon this resolution by the order is the true construction, adopting that construction for the purpose of this case, though not giving it our full approval, we adopt and apply to such folder notice what we have said with respect to the notice in the official organ sent to the member, to-wit, that the mere mailing thereof addressed to the member can not be deemed a compliance with the requirement of the law that the member shall be actually notified of the assessment before he can be considered as in default and his rights as a member suspended, forfeited and terminated. We have no doubt but the order might lawfully provide that a notice thus mailed to members should be sufficient to put them in default, though they failed to receive it; but we believe the courts do not and will not so construe a provision for notice in a case of this character unless the language is so clear to that effect as to admit of no other reasonable construction.

I will now call attention to a few authorities upon this question. We had before us recently the case of *Hayes v. Yost*, in which was involved the question of how a notice provided for by Section 2807, Revised Statutes, with respect to equalizing boards and their transactions, where they

are authorized to raise the valuation upon property for purposes of taxation, must be served upon the owners thereof. The provision then under consideration is to the effect that such addition shall not be made to such lists returned, without the board having first given reasonable notice to the owner of the property to be revalued. The board in that instance mailed a notice to Mr. Hayes. It did not appear that he had received the notice mailed. It was insisted in behalf of the taxing officers that the mailing of the notice was sufficient. Judge Haynes, in the course of his opinion, had this to say upon the subject, page 25:

“The statute provides that the party shall be given reasonable notice. He is to have a notice that is reasonable, notice as to the time and place, so he may have an opportunity to appear. Notice is to be given to him. The court below found that a notice put in the post office directed to him was sufficient. We are unable to agree with the court in that respect, because we find decisions of the Supreme Court of this state and other courts that lead us to an opposite conclusion. And because, in reason, if he is to have notice, it should be given to him in person, served upon him, so that the board, before it acts, may know that he has received it and that it has jurisdiction over him.

“In the case of *Moore v. Given*, 39 Ohio St., 661, the second syllabus says:

“‘Where a statute requires notice of a proceeding, but is silent concerning its form or manner of service, actual notice will alone satisfy such requirements.’”

Now that is the law upon the subject of a statutory notice. But we have authorities directly in point upon the question of notices of the kind provided for in the laws of this order. I call attention to the case of *Castner v. Insurance Co.*, 15 N. W. Rep., 452 (50 Mich., 273). It is said in the syllabus:

“The charter of a mutual insurance company provided that members should be *notified* of assessments by circular or verbally, and that if they did not pay within a fixed time they would forfeit protection through their policy. *Held*: That such a personal liability could not attach from merely mailing the notice if it was not actually received.”

The question is discussed at page 454, where the court say:

“As to the *second* point, was the fact of mailing the paper which contained the information for the member sufficient of itself to constitute the notification required by the charter? The proposition here is that it makes no difference whether the member ever gets knowledge of the assessment upon him or not, provided notice of it is regularly mailed to him, and therefore the contention is to be viewed on the assumption that he does not get it. The language of the charter is that the member is to be ‘*notified* by the secretary or otherwise, either by *circular* or a *verbal notice*’ (Section 16). The consequences to flow from this notification are admitted to be important.

“A fixed personal liability is to depend upon it; and, further, in case of failure to respond by payment of the sum assessed as communicated by the ‘notice’ during a given number of days, the member is to stand unprotected by his policy and wholly without remedy or redress in case of loss. In principle it is not so easy to distinguish the nature of the required notification from the office and object of service of process, and there would seem to be as much reason for real notice in the case in question as in the case of an action. The destruction of a mail, or accidents preventing the delivery of matter, or even a considerable delay, might at any time, without fault of the persons insured, eventuate in widespread loss and injustice.

“No construction, open to so much objection, should be admitted, unless rendered necessary by the terms of the charter; and they do not require it. On the contrary, they contemplate that the members shall have real information of the assessment. The provision is not that notice or information shall be mailed or sent or forwarded. The members are to be ‘notified’—that is, informed; to have made known to them the fact of the assessment; and this is permitted to be done either by oral statements to the members or by delivery to them of written statements through the agency of the post office or some other. It follows that the second ground of defense can not be supported.”

Also in the case of *Wachtel v. Widows & Orphans’ Soc.*, 84 N. Y., 28 (38 Am. Rep., 478). Also to the case of *McCorkle v. Benevolent Assn.*, 71 Tex., 149 (8 S. W. Rep., 516). I will read part of the syllabus in that case:

“The by-laws of the T. B. A. required that notice of its assessments shall be sent to each member and that ‘any person who shall fall in arrears for dues or contributions, after thirty days notice, shall cease to be in good standing and shall forfeit all rights and claims to any and all benefits of the association.’ It was the custom of the officer charged with the duty to mail

1904.]

Lucas County.

such notice to each member. *Held:* That a reasonable construction of the by-laws required that notice be in fact given to a member before a forfeiture would result from a failure to pay dues, etc., and that mailing to a member through the post office was not such notice."

We therefore conclude that it devolved upon the order in this case to aver and establish by a preponderance of the evidence, at least, that the folder notice of assessment falling due August 28, 1900, was not merely mailed to James K. Crockett, but that he actually received a copy thereof. I have already called attention to the fact that the answer fails to aver that he received a copy, and, in our opinion, it was, therefore, so far as that defense is concerned, open to a general demurrer. But because of the averment in the reply to which I have called attention, and because of the manner in which the case has been tried and presented, we proceeded to consider this defense upon the facts. Now the evidence that this notice was ever actually mailed is not clear nor satisfactory. The supreme scribe, by whom the notice is to be mailed, says that as a rule he did not mail these notices; that he did not address the envelopes containing the notices, but that was done by a secretary or employe in his office. He can not tell whether this notice was actually mailed to Mr. Crockett; he has no recollection or knowledge upon the subject; and the employe in his office is not called upon to testify.

But it is urged on behalf of the association that Mr. Crockett must have received this notice, because in a certain conversation he spoke of the August assessments, the "double headers." It is said that he spoke particularly of these August assessments in a conversation with Mr. Lee, the scribe of the local commandery, but a few days before his death, complaining of the "double header," declaring that he would not pay any more assessments, and saying to Mr. Lee that he might strike his name from the roll of membership. It is doubtless true that Mr. Crockett had knowledge of the August assessments. How he obtained this knowledge, we are not advised. He might have been apprised of the fact in various ways. But we hold that it devolves upon the order to show that he was served with this

folder notice, or that he received it, in order to put him in default; and the fact that the making of such an assessment had come to his knowledge in a roundabout way is not sufficient basis upon which to predicate a forfeiture of his rights and interests in the society.

Mr. Lee testifies that during this conversation Crockett had a paper in his hand, and that in speaking of the "double header" for August, he flourished a paper, or called attention to a paper and wanted to know if the assessments mentioned there or spoken of there were correct; if it was true that such assessment had been made for August. Mr. Lee does not pretend that he examined this paper. He does not say that he had it in his hands. He does not say that it was one of these printed blank or folder notices. If it were a printed blank notice of the kind that Crockett had been in the habit of receiving, it is hard to understand why he should have made any such inquiry of Mr. Lee, because the notice upon its face is perfectly clear. He had been in the habit of receiving such notices for a long time, and he would have understood as fully and perfectly as Mr. Lee did what was stated therein, and that it called for the payment of a double assessment on August 28. It may have been a mere memorandum made by somebody else, or by himself, of the fact that there was a double assessment for August.

The mother of Mr. Lee, who was present part of the time on the same occasion, also says that Mr. Crockett, at the time he was speaking of the assessment, held a paper in his hand. But she does not attempt to describe the paper. It is very significant that upon the trial of this case in the court of common pleas, neither Mr. Lee nor his mother made any reference whatever to this paper or to any paper having been in the possession of or having been shown by Mr. Crockett upon that occasion.

But laying that aside, we are not satisfied by the testimony of Mr. Lee or his mother, or by any other evidence in the case, that Mr. Crockett had come into possession of a notice of these August assessments, such as the supreme scribe was required to send out, and that therefore he did not have the actual notice emanating from the order that is required to put him in default so that his rights might be forfeited.

1904].

Cuyahoga County.

A few days after this interview with Mr. Lee, Mr. Crockett, who was a very old man, suffered a severe injury, lingered along in misery for a few days, and then died.

Some interesting questions are presented and discussed as to whether there was not a waiver of any default upon the part of Mr. Crockett by certain conduct upon the part of the local organization; as to whether the organization as a whole is not estopped by certain misleading statements made to one who undertook to pay these assessments on behalf of Mr. Crockett or on behalf of the beneficiary. But we deem it unnecessary to discuss these questions. It is sufficient that we have found that Mr. Crockett never received the actual notice which put him in default; and therefore we find that the plaintiff is entitled to the relief prayed for in the petition, and judgment will be entered accordingly.

James M. and Walter F. Brown, for plaintiff.

Roy Spencer, for defendant.

ORDER TO VACATE LEASED PREMISES NOT AN EVICTION.

[Circuit Court of Cuyahoga County.]

SAMUEL GREENBERG v. TIMOTHY MURPHY.

Decided, June 20, 1904.

Landlord and Tenant—Notice to Vacate on Pain of Eviction—Not an Eviction, Where the Lease Has Not Expired.

Before the expiration of the term under a lease, a landlord served upon his tenant a notice in writing to vacate the demised premises within three days, or legal measures would be taken to obtain possession, and the tenant thereupon moved out without protest—*Held*: No eviction.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Error to the court of common pleas.

The error complained of in this case is the action of the trial court in sustaining a general demurrer to the amended petition. Said amended petition reads as follows:

"Now comes the plaintiff and by leave of the court first had and obtained, files this, his amended petition herein, and for his cause of action says that prior to and upon the first day of September, 1903, and while the said plaintiff was a tenant of the said defendant and was occupying the premises herein-after mentioned and described, the said defendant, for a valuable consideration, agreed to and with the said plaintiff that he would further lease and let to the said plaintiff the said premises then being occupied by plaintiff, and which premises have been so occupied by the plaintiff for two years prior thereto, for a further term of one year after the expiration of the then term under which the plaintiff was then occupying the said premises, to-wit, No. 2336 Broadway, in the city of Cleveland, Ohio. That in pursuance, and as a result of such promise and agreement so made by said defendant with said plaintiff as aforesaid, the plaintiff relying thereon that he would have the said premises above described for another year, incurred expenses by way of repairs upon the said property, such as plumbing, paper hanging, etc., to the extent and cost of two hundred (\$200) dollars.

"The plaintiff further says that upon the first day of September, 1903, the said defendant, in pursuance of the contract and agreement and promises so made as aforesaid, entered into a written lease or agreement to make a lease to the plaintiff for the occupancy of said property above described, and was to receive from the said plaintiff as rental for the said property the sum of four hundred and forty-four (\$444) dollars per year, which sum of \$444 was to be paid in installments of \$37 per month in advance, and an additional sum of \$1 per month for water rent.

"That the plaintiff performed all of the obligations on his part to be performed, but that the defendant, disregarding his obligations and agreements so made as aforesaid, did, upon and about September 10, 1903, cut certain water pipes then connected with a certain watering-trough in front of plaintiff's place of business, which had been erected and constructed by plaintiff, and was being used in connection with the carrying on and transaction of the plaintiff's business, thus causing a great inconvenience to plaintiff's customers and damage to said plaintiff.

"The defendant further says upon the 28th day of September, 1903, defendant notified this plaintiff in writing that the plaintiff's tenancy of the premises above described and known as 2336 Broadway, must and would cease on September 30, 1903, at which time the said defendant would take posses-

1904.]

Cuyahoga County.

sion of the said premises, and further served an additional notice in writing upon plaintiff to vacate the said building and lot of land within three days, or legal measures would be taken by said defendant to obtain possession thereof.

“Wherefore said plaintiff immediately, or as soon thereafter as was possible, secured another place and vacated the said premises in accordance with the said notices. Plaintiff was compelled to pay additional rent for a place in which to continue and carry on his business, and by reason of the action on the part of said defendant in so refusing to carry out and perform his part of said agreement and to execute said lease as aforesaid and allow said plaintiff to remain in peaceable possession of the said premises as theretofore agreed upon, said plaintiff was damaged to the extent of \$1,500.

“Wherefore, the plaintiff prays judgment against defendant for damage so sustained by him in the sum of fifteen hundred dollars (\$1,500).”

It will be noticed that this pleading does not definitely state when the original two years' lease ended and when the new term was to begin, but we take it that the old lease ended August 31, 1903, and that plaintiff was in possession on September 10 when the water pipes were cut and thereafter and until he moved out, under what he claims was a new “written lease or agreement to make a lease.”

No copy of this writing is attached to the pleading and as to the premises demised, all we know is that they were No. 2336 Broadway, in the city of Cleveland.

Whether the water pipes connected with a certain watering trough in front of plaintiff's place of business which defendant cut were appurtenant to said premises and whether defendant violated any of the covenants of said alleged lease by cutting them we are unable to say.

The only other wrongful act of the defendant complained of is that he notified the plaintiff that the tenancy must cease and served three days' written notice to quit, or legal measures would be taken to obtain possession of the premises.

If this conduct of the defendant amounted to an eviction, the amended petition states a good cause of action; if not, the demurrer was properly sustained, for if the plaintiff voluntarily

complied with the defendant's request and moved out without protest, he has no ground of complaint.

McAdam, in his work on Landlord and Tenant, gives the rules as to eviction as follows:

"The test as to eviction is whether the tenant has been deprived of the beneficial enjoyment of the estate, or a portion of it, by the wrongful act of the landlord." McAdam on Landlord and Tenant, Volume 2, Section 418.

"The wrongful acts of a lessor do not, in law, amount to an eviction, where there is neither an actual nor a constructive expulsion of the lessee from any portion of the demised premises." McAdam on Landlord and Tenant, Volume 2, Section 418, page 1335.

"To work a suspension of the obligations of the tenant, under the lease, while his rights under it remain in full force, *there must be an exclusion* of the occupant from some portion of the premises demised or a substantial and effectual deprivation of the beneficial enjoyment of the property, in whole or in part. Any of the following acts will constitute an eviction, viz.: Preventing the tenant from occupying the premises by any act of the lessor or by one having paramount title; a recovery of judgment in ejectment by the owner of a paramount title; an injunction by the lessor against the use of the premises; a judgment of eviction in his favor." McAdam on Landlord and Tenant, Volume 2, Section 407.

The text is supported by numerous authorities and illustrations of the application of the above principles, but none of the cases cited contain the proposition that a right of action arises in favor of a tenant as for an eviction or breach of the lease contract upon a mere demand by the landlord of possession and the voluntary surrender thereof by the tenant.

Nothing more than this is alleged in the petition; the landlord demanded possession and demanded it in writing; he said he would begin legal proceedings to recover possession if the tenant did not comply with the demand. It is not alleged that he did begin legal proceedings or do anything else showing his intention to evict the tenant. If the tenant was rightfully in possession and entitled to remain, he should have awaited the legal proceedings that were threatened and made his defense thereto, rather than to have complied with the demand, as he

did, and then bring his action for alleged damages which perhaps never would have resulted.

The cases cited by plaintiff to sustain the sufficiency of the petition are most of them illustrations of the rule that an action for rent will not lie in favor of the landlord where the tenant leaves the premises as the result of some action on the part of the landlord evidencing his desire to terminate the lease. They have no application to a case like this where the tenant seeks to found a right of action upon the wrongful acts of the landlord. Such cases hold that a rescission of the contract of lease is worked by the acts of the landlord showing such intention and the consent of the tenant thereto. This suggestion also disposes of the contention of plaintiff that eviction is a matter of intention, and as the intention must be gathered from acts, the question of intention must be left to the jury. In this case there is no allegation of any facts which can possibly be construed as amounting to an eviction, and therefore nothing to submit to a jury for its determination upon the subject.

We are cited to the case of *Tarpy v. Blume*, 101 Iowa, 469, as sustaining the proposition that serving a notice to quit amounts to a wrongful eviction. The syllabus of that case reads as follows:

“Actual force is not essential to a wrongful eviction of a tenant by his landlord, but such eviction may be effected by the serving of a notice to quit within a specified time prior to the expiration of the period for which the tenant is entitled to possession, the moving of property into the buildings without the tenant’s consent and the latter’s leaving the premises in consequence thereof.”

It is evident that the decision of this case turned on the fact that the landlord took possession of the buildings on the demised premises without the tenant’s consent, and not on the notice to quit. On page 471 of the opinion, Judge Given distinguishes the case from the case of *Wright v. Everett*, 87 Iowa, 697, and says:

“In that, the landlord entered without objection, while in this, it was against the protest of the plaintiff.”

In the latter case there was only a notice to quit and entry by the landlord without protest from the tenant, who soon thereafter quit, and the court held "that the possession taken by the lessor was not wrongful and that the lessee was not entitled to damages therefor."

The latter case, and not the former, is in point and should be followed in determining the case at bar. There is no allegation in the petition that plaintiff protested against leaving the premises; his voluntary compliance with the notice to quit determined his rights and put them at an end.

The demurrer was properly sustained and the judgment is affirmed.

J. F. Clark, for plaintiff in error.

Scott & Parks, for defendant in error.

BILLS OF EXCEPTIONS.

[Circuit Court of Crawford County.]

A. STRAUCK V. MASSILLON STONEWARE CO.

Decided, January Term, 1904.

Bills of Exceptions—Errors Must Appear Upon the Record—Order Making Bill Part of the Record Necessary—Signature of Trial Judge and Proper Filing of, not Sufficient—Office of Motion to Strike Bill from the Files—Original Papers Which are a Part of the Record—Jurisdiction.

1. The circuit court has jurisdiction under Section 6709 to review, vacate or modify a judgment of the common pleas court only for errors appearing upon the record.
2. The warrant for filing original papers in the circuit court extends only to such papers as are a part of the record in the court below. Original papers which were not properly a part of the files in the court below, are not properly made part of the record there, and are not necessarily nor properly a part of the files of the circuit court; and a motion to strike a bill of exceptions from the files of the circuit court does not involve the question whether the bill was a proper *file* in the common pleas, but whether the bill was and is a proper part of the *record* in that court.

1904.]

Crawford County.

3. The mere filing of a bill of exceptions in the circuit court does not make it a part of the record nor can an order of court making it a part of the record be presumed from the fact that it was allowed, settled and signed by the trial judge.
4. Section 5302, Revised Statutes, as amended October 22, 1902, does not dispense with the necessity of an entry by the trial court making the bill a part of the record.

MOONEY, J.; DAY, J., concurs; and NORRIS, J., dissents.

Error to Crawford Common Pleas Court.

In the original action the parties were reversed. The action was commenced in the justice of the peace court; was appealed to the court of common pleas; issues were made by the pleadings; the action was tried to a jury; a verdict returned for plaintiff; defendant's motion for a new trial was overruled, one ground of the motion being that the verdict is not sustained by sufficient evidence. Defendant duly excepted; judgment for plaintiff was entered on the verdict; defendant duly prepared his bill of exceptions and filed the same; a proper entry of the date was made on the appearance docket; the bill was afterwards settled, allowed and signed by the trial judge.

The defendant afterwards, as plaintiff in error, commenced this proceeding in error to reverse the judgment of the common pleas. All the errors assigned are predicated upon the bill of exceptions. The record shows no order of the trial court making the bill of exceptions a part of the record and for want of such order, defendant in error here moves that the bill of exceptions be stricken from the files of this court.

It is doing no violence to the facts in this case to say that this motion and its proper determination have occasioned the court a very great amount of trouble. This has been increased by reason of the fact that upon critical examination we have arrived at a conclusion at variance with our preconceived notions of the law upon the subject under consideration. However, the only province of this court is to declare the law as it finds it, leaving the work of legislation to the General Assembly and all other changes of the law to the Supreme Court. By Section 6709, Revised Statutes, this court has jurisdiction to review, vacate or modify a judgment of the court of common pleas *only*

for errors appearing upon the record. By Section 5334, Revised Statutes, the record is required to be made up from the petition, the process, the return, pleadings subsequent thereto, reports, verdicts, orders, judgments and all material acts and proceedings of the court, and "the bill of exceptions shall be filed with the pleadings and papers, but not recorded, unless the court for good reasons shall so order."

By Section 6716, Revised Statutes, the plaintiff in error "shall file with his petition either a transcript of the final record, or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of; and, if original papers and pleadings are filed, and the final record has not been made, the reviewing court may permit the temporary withdrawal of the originals for a reasonable time, to allow the recording thereof." From this provision it is held that the only necessity, as indeed the only warrant to file original papers in this court, extends to such original papers as are part of the record in the court below, and that such original papers as are properly a part of the files in that court, but are not properly a part of the record there, are not necessarily nor properly a part of the files in this court. A motion to strike the bill of exceptions from the files therefore does not involve the question whether the bill was a proper *file* in the court of common pleas, but does involve the question whether the bill was and is a proper part of the *record* in that court.

No one will doubt that prior to the act of October 22, 1902 (96 O. L., 17), a bill of exceptions, though duly settled, allowed and signed by the trial judge or judges and filed in the cause, did not become a part of the record proper to be considered by a reviewing court in proceedings in error, without an order of the court making the bill a part of the record. Prior to that act it was required that the journal, by proper entry, should show (1) either by direct affirmative statement or by presumption arising from the journal entry, that the bill was duly settled, allowed and signed by the trial judge or judges; and (2) that the court order the bill to be made a part of the record (*Felch v. Hodgman*, 62 Ohio St., 312, and *Riverside Rubber Co.*

1904.]

Crawford County.

v. *Manufacturing Co.*, 63 Ohio St., 66). In this latter case the first paragraph of the syllabus is:

“In order to entitle a bill of exceptions to be considered by a reviewing court, it must be shown by a proper journal entry that the bill was ordered made a part of the record.”

The case was one arising in 1897 when Section 5334, Revised Statutes, defining what the record shall contain, was in its present form, and when Section 5302, Revised Statutes, provided that:

“The bill of exceptions shall be filed with the pleadings, and, if the party filing the same request it, made a part of the records, but not spread upon the journal; and an entry of the allowance and signing of the same must be entered upon the journal of the court within the time fixed for such allowance and signing.” (89 O. L., 125.)

It will be noted that the sections contain no express requirement that the entry making the bill a part of the record shall be made upon the journal. The provision that the bill shall become a part of the record *if the party requests it* does not, of itself, require an entry to show such request (*Smith v. Board of Education*, 27 Ohio St., 44). If the mere filing, after allowance and signing, made the bill in fact part of the record, the request would be presumed. It follows, therefore, that the Supreme Court has determined, in view of the provisions of Section 5334, Revised Statutes, as it now exists, and of Section 5302, Revised Statutes, as it existed prior to October 22, 1902, and when the latter section expressly required an order of the allowance and signing of the bill and was silent as to the necessity of an entry ordering the bill to be made a part of the record, that, nevertheless, the bill did not become a part of the record, for purposes of review without an express order of the trial court making it so. In this state of the law the amended Section 5302, Revised Statutes, was passed on October 22, 1902, and is as follows:

“It shall not be necessary to cause an entry to be made upon the journal of the court of the settling, allowance and signing of any bill of exceptions; but the signature of the trial judge,

or other judge mentioned in Section 5301a allowing, settling and signing such bill, shall be sufficient evidence of *such fact*."

Neither this nor any other amended section expressly dispenses with any other entry relating to bills of exceptions, nor is there now any express requirement of an entry showing an order by the trial court to make the bill a part of the record.

It seems to follow necessarily that if the filing of the bill, after its due signing and allowance and with the necessary entry to show such signing, allowance and filing, did not make the bill a part of the record before the amendment, the filing of the bill with the signature of the judge, instead of the entry, as sufficient evidence of the fact of allowance, settling and signing, since the amendment will not have that effect. A bill of exceptions since, as well as before the amendment, does not, upon filing by mere force of either Sections 5334 or 5302, Revised Statutes, become a part of the record, and so, under the former section, it requires something more than filing, after settling, allowance and signing, to-wit, an order, which, for the purpose, would become and be "a material act and proceeding of the court to make it so," and of course, all orders and material acts and proceedings of the trial court must be evidenced here by a proper transcript of the journal, unless the statute expressly makes some other showing of such fact sufficient evidence of it. While in *Felch v. Hodgman*, 62 Ohio St., 312, a presumption of due allowance and signing by the trial judge was indulged from the subsequent action of the court in ordering the bill to be made a part of the record, in this case it can not be presumed, from the fact of the prior allowance and signing of the bill, that the trial court subsequently ordered the bill to be made a part of the record.

We feel that, on the authorities, we are compelled to sustain the motion and strike the bill from the files here, and we declare that this action is taken only with extreme reluctance.

The pleading sustain the judgment, and the bill of exceptions being disregarded, we find no error in the record and the judgment is therefore affirmed.

.. *Harris & Sears*, for plaintiff in error.

Finley & Gallinger, for defendant in error.

1904.]

Belmont County.

**JURISDICTION OF PRESIDENT PRO TEM OF COUNCIL ACTING
AS MAYOR.**

[Circuit Court of Belmont County.]

THE STATE OF OHIO V. WILLIAM T. HANCE.

Decided, June Term, 1904.

Criminal Law—Procedure under Beal Law Prosecution—Mayor Accused of Bias—President Pro Tem of Council Assigned to Try the Case—Held to Have Had no Jurisdiction.

1. The president pro tem of a village council as acting mayor, under Section 1536-854 of the Revised Statutes, has no jurisdiction to hear and determine a misdemeanor.
2. The circuit court has no jurisdiction to hear a petition in error filed by the state in a criminal case to reverse the judgment of the court of common pleas, discharging the accused.

COOK, J.; LAUBIE, J., and BURROWS, J., concur.

Error to the Court of Common Pleas of Belmont County.

An affidavit was filed before the mayor of the village of Barnesville charging the defendant in error, William T. Hance, with unlawfully furnishing intoxicating liquors to a party named in the affidavit within the village of Barnesville, where such furnishing was prohibited under the provisions of the statutes known as the Beal Act. When the accused was arraigned, he objected to being tried before the mayor, for the reason that the mayor was biased and prejudiced; that he had been an eye-witness to the transaction, upon which the state relied for conviction, and had expressed an opinion from such personal observation of the transaction that the accused was guilty. Thereupon the mayor, considering himself disqualified, transferred all the papers in the case to the president pro tem of the council of the village, with instructions to hear and determine the case. When the case came on for trial before the president pro tem of the council, the accused objected in due form to his proceeding in the case, for the reason that he had no jurisdiction in the matter. This objection was overruled, to which the accused excepted; and in order to save the expense of a trial, he entered a plea of guilty, and was

fined seventy-five dollars and costs. The accused then filed a petition in error in the court of comon pleas to reverse the judgment, assigning as cause for such reversal that the president pro tem of the council had no jurisdiction of the case. The court of common pleas, on this ground, reversed the judgment and discharged the accused. The state now prosecutes error in this court to reverse the judgment of the common pleas court.

The sole question is: Had the president pro tem of the council jurisdiction to hear and determine the case upon a plea of guilty? It is claimed he had; and, in support of this claim, Section 1536-854 of the revised statutes is invoked. That section, after providing for the election, term, qualifications and duties of the mayor, in the second paragraph provides as follows:

“When the mayor is absent from the village, or is unable from any cause to perform his duties, the president pro tem of council shall be acting mayor. In case of the death, resignation or removal of the mayor, the president pro tem of council shall become the mayor and serve for the unexpired term, and until the sucessor is elected and qualified; and the vacancy thus created in council shall be filled as other vacancies therein, and council shall elect another president pro tem from their own number, who shall have the same rights, powers and duties as his predecessor.”

Does this provision of the statute clothe the president pro tem of council with authority to hear and determine a case of this character? The affidavit charges a misdemeanor, and Section 1536-876 provides that the mayor of an incorporated village shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is, by the Constitution, entitled to a trial by jury; and his jurisdiction in such cases shall be co-extensive with the county. This was a prosecution in which the accused was not, under the Constitution, entitled to demand a trial by jury; therefore, the mayor would have final jurisdiction; and it is insisted that the president pro tem of the council, as acting mayor, would have the same jurisdiction as the mayor.

1904.]

Belmont County.

It will be observed that Section 1536-854 is found in chapter 2, which provides for the executive powers and duties of the officers of the village; and the first part of the section sets forth such duties of the mayor as are primarily ministerial. Chapter 3 provides for the judicial powers of the mayor and police courts; and in that chapter we find no provision that the president of council, as acting mayor, shall possess any judicial powers whatever. Mayors and justices of the peace are elected by the people, for the purpose of exercising judicial functions to a certain extent. Presidents pro tem of councils are not elected by the people, but appointed by council to perform certain specified duties. The judicial powers of justices of the peace to hear and determine criminal prosecutions, with jurisdiction co-extensive with the county, is a high prerogative; and we do not think a member of council, who was not elected with any expectation that he would perform such important judicial functions, should be held to be clothed with such power, unless the statute expressly so provides; and that all that was intended by the provision was that, in the absence of the mayor from the village, or his inability for any cause to perform his duties, the president pro tem of council should then be acting mayor and discharge the ministerial duties of that office.

In Sections 1536-773a, it is provided that "in cities having no police judge, in the absence, or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor." We are not prepared to say, as claimed by counsel, that this provision applies to villages. This provision, however, should have some effect in construing the section under consideration. The president pro tem of council of cities has the same powers as in villages when the mayor is disqualified from acting. The provisions as to cities and villages are very similar (Section 1536-664). Why, then should the mayor of a city be required to call in a justice of the peace, in a city having no police judge, to perform his duties in criminal cases? The president pro tem of council could perform the duties as well in cities as in villages, but in cities he is deprived of that power. From

these considerations we are persuaded that the president pro tem of a council of a village has not jurisdiction to hear and determine a prosecution for a misdemeanor.

This view is strengthened by the decision in case of *Logan Branch Bank, Ex parte*, 1 O. S., 432. On page 434, Corwin, Judge, says:

“It is not within the competency of the Legislature to clothe with judicial power any officer or person not elected as a judge.”

We are not unmindful of the fact that police judges may be appointed by council, and justices of the peace may be appointed by the trustees of the township to fill out unexpired terms, but they are appointed for the express purpose of exercising judicial powers, and by express authority of the General Assembly.

We have said this much for the reason that this was the only question made in the case. However, this was entirely unnecessary, as this court has no jurisdiction in this proceeding in error. The action of the court of common pleas was a complete and final determination of the case in favor of the accused. It held, as we have said, that the president of council, as acting mayor, had no jurisdiction, and discharged the accused. That ended the case. Error can not be prosecuted by the state from a judgment of the court having jurisdiction of a criminal case where the accused is discharged, in the absence of statutory authority for such proceeding. *State v. Simmons*, 49 O. S., 305; *State v. Bour*, 10 C. C. R., 58.

There is no warrant in the statutes for such prosecution of error by the state, and the petition in error will therefore be dismissed for want of jurisdiction in this court, at the costs of plaintiff in error.

Smith & Howard, for plaintiff in error.

E. T. Petty, for defendant in error.

1904.]

Cuyahoga County.

CAPACITY TO MAKE A WILL.

[Circuit Court of Cuyahoga County.]

AMELIA K. REWELL V. JOSIE R. WARDEN ET AL.

Decided, February 4, 1903.

Will—Competency of Testator to Make—Undue Influence—Can Not be Inferred, When.

1. One has sufficient mental capacity to make a valid will when he is able to enumerate his property, and remembers who are the natural objects of his bounty, and successfully conducts considerable business interests, notwithstanding he may be eighty-four years old and somewhat forgetful as to minor matters.
2. A bequest to his wife of something over one-third of the testator's estate is not so in excess of her rights as to raise a presumption of undue influence. Nor is undue influence shown by the fact that she was a third wife and treated him with great kindness, anticipating his wants and aiding him in his affairs.

MARVIN, J.; HALE, J., and CALDWELL, J., concur.

Error to the court of common pleas.

The action below was brought by Josie R. Warden, who is a daughter by adoption of Captain Cornelius Rewell, deceased, against Amelia K. Rewell, widow of said deceased; George M. Rewell, a son of said deceased; Jessie M. Rewell, wife of said George, she being a beneficiary under the will of said deceased, and John Wilson and Homer O. Stafford, executors of said will. The only heirs at law of the deceased are the said Josie R. Warden and the said George M. Rewell.

Cornelius Rewell died March 22, 1899, at the age of eighty-four years. His widow was his third wife. His second wife died June 18, 1895. On February 16, 1899, he executed a written instrument purporting to be his last will and testament. This was properly witnessed as such will and in this opinion is hereafter spoken of as a will. This will was duly admitted to probate in this county and letters testamentary issued thereon to the defendants, Wilson and Stafford, who are named as executors in said will. By the terms of said will all of the property of the testator is disposed of. His estate was worth about \$32,000,

of which he bequeathed to Mrs. Warden the sum of \$25; to his widow a property worth about \$13,500; to his daughter-in-law, Jessie M. Rewell, property of about the value of \$18,500; this last bequest being his entire estate not disposed of to the other parties to whom bequests were made.

The petition sets out that the writing hereinbefore mentioned was not the will of said Cornelius Rewell; that at the time of its execution said decedent was not of sound mind and memory and did not have testamentary capacity, and that "he was persuaded, influenced, induced, deceived and coerced by the said Amelia K. Rewell and by others acting in her interest, and so was not free from restraint and undue influence." The prayer of the petition is that said writing may be adjudged not to be the last will and testament of the deceased.

Proper issues being made in the case, it went to trial in the court of common pleas to a jury who returned a verdict that the writing was not the will of the deceased. Motion for new trial was made by Amelia K. Rewell, which was overruled and exception taken, and the case comes here for review on proceedings in error. A bill of exceptions is presented in this court containing all the evidence introduced upon the trial, together with the charge of the court given to the jury and the requests to charge made by the parties in the case.

On the part of the plaintiff in error it is urged that the verdict is not sustained by the evidence. So far as the claim made by the plaintiff below, that the defendant, Amelia K. Rewell, or any one in her interest unduly influenced the deceased is concerned, we find nothing to sustain it. The evidence is that Mrs. Rewell, who was the third wife of the deceased and who was married to him on May 24, 1896, treated him with great kindness, anticipated his wants and aided him more or less in his affairs. To hold that such conduct on the part of his wife was to unduly influence him in her behalf would be to ignore what we regard as the highest duty of a wife to her husband. When she married Captain Rewell she undertook and agreed to treat him with affection and kindness; to aid him, so far as she could, in whatever was to his interest, and surely the faithful carrying out of this obligation ought not to be charged up against her

1904.]

Cuyahoga County.

as being an effort on her part to unduly influence him in her favor. She wanted his affection or she would not have married him; she was entitled to his affection, or he should not have married her; he needed her kindly offices and was entitled to receive them, and nothing in the evidence tends to show that her conduct toward him was other than in the highest degree commendable. Nor is there any evidence tending to show that any one in her behalf tried to influence him unduly in her favor. She seems to have been affectionate and kind to him and he to have appreciated and reciprocated that kindness and affection. In this the conduct of each was commendable. We find nothing in the will itself, when taken in connection with the undisputed evidence, to indicate that he was unduly influenced by anybody, or that the will was one which, in the nature of things, should excite a suspicion of undue influence or of want of mental capacity.

Mrs. Warden, though she would have been an heir at law had he died intestate, was so only because she had been legally adopted by him as a daughter. The evidence clearly shows that he loved this daughter. He often spoke of her in the same affectionate manner which might be expected of a father speaking of his daughter. But there had been trouble between her husband and Captain Rewell, growing out of a loan which had been made to Mr. Warden. This loan amounted to about \$4,700. Warden had not paid it, his claim being that it was money of Mrs. Rewell, the second wife of Captain Rewell and the adopting mother of Mrs. Warden. Captain Rewell claimed that the money was due to him. Without reference to which of the parties was right in the claim made as to this money, it may well explain why Captain Rewell should have a feeling against Mr. Warden and against giving any part of his property in such wise that it could benefit Warden. Whether Warden had really wronged him or not, Rewell believed that he had, and so believing, it is not extraordinary that a man of sound mind should have felt that no more of his property should go into the family of Mr. Warden.

As to his son George, it seems clear from statements made by Captain Rewell himself and from the evidence in the case that he felt that George and his family would be much more benefited

by having a bequest made to his wife than by having it made to him. George had not been fortunate in business, and it was evidently the fear of Captain Rewell that property bequeathed to him might be seized by his creditors, and so his family be entirely deprived of the benefit of it, whereas, if it were given to Mrs. Jessie M. Rewell, George and his family would thereby be provided for.

The amount bequeathed to the widow of the deceased, as compared with his entire estate, is not so great as to raise a probability that he was unduly influenced, or that he was of unsound mind.

Coming now to the testimony of the witnesses as to the mental capacity of Captain Rewell:

We find, first, Captain George Stone, an old and intimate friend of the deceased. He noticed in the last years of Captain Rewell's life that his memory was not as good as it had been earlier. He mentions the case of Rewell asking him in reference to a sister of the witness. Witness told him that she was alive. Rewell said it seemed to him that he had heard she was dead, and then this language is used by the witness: "And then perhaps he would ask the same question right over again, in a little while the same." It will be noticed that he does not specifically give an occasion when this occurred, as though he were following up one conversation, but as though he had noticed a general tendency on the part of Captain Rewell to forget what had been said to him on some subject and asked about the same subject again. He gives another instance of his asking several times where a Mrs. Simpson was, he having answered the first time the question was asked him that she was at Vermillion. He says that during one conversation he made inquiry about this woman at least three times.

Edward Keron, who lived in a house belonging to Captain Rewell and who saw him very often, says that he was somewhat forgetful; that he would ask the same question three or four times within a short space of time. He mentions especially the fact that Captain Rewell gave him the details of a story of a trip he made on the lakes once in going to Buffalo, when they

1904.]

Cuyahoga County.

had a great storm. Witness says Rewell told him this twelve or fifteen times during the last year of his life.

If every man who repeats a good many times over to the same persons some extraordinary event of his life were to be held of unsound mind, it would include a very large percentage of those who have passed the age of sixty years; in short, there was evidence in this only of the fact that, like other old men, he was given to reminiscence and would be very likely to repeat the story of some remarkable incident in his life. Captain Rewell asked this man for rent at one time when the rent had been paid the day before. The captain seemed to have forgotten it. Witness says he was forgetful about making repairs on the house which he rented of him.

Witness Byers, who is a notary public and who deals somewhat in real estate and who sells coal, was well acquainted with Mr. Rewell, who frequently called at the office of the witness and frequently asked of the witness if he were doing well in his business, and how much he got for selling coal. He also asked whether he owned the property where he lived, even though he had answered him a good many times that he did own it. At one time Captain Rewell bought a load of coal of the witness and paid for it, and next day he went into witness's office and said, "I believe I owe you for a load of coal, don't I?" seeming to have overlooked the fact that he paid for the coal the day he bought it.

J. H. Reed was a tenant of Captain Rewell. On two occasions he paid the rent to Rewell, and Rewell again asked him for payment. In each of these instances a receipt was given by Rewell to the witness when the money was paid. The facts as to one of these instances seems to be that Rewell went into the place of business of the witness, the rent was paid to him and he signed a receipt, put the money in his pocket, and when he went home, being unable to find the money about his person, came back, thinking that it must be that, as he had remained and talked with the witness some time, he had given the receipt without actually receiving the money. When he went back, however, on being assured that he had been paid, he made further investigation and found the money in his pocket. This

would perhaps indicate that he was not as careful as he would have been once, but surely it is not a very remarkable thing and is far from showing that one is without testamentary capacity. On the other occasion, several days intervened between the time of the payment and the call made by Rewell for the rent, which would indicate, certainly, that the memory of Captain Rewell was not first-rate, yet it can hardly be said that one who forgets that money has been paid to him is necessarily of unsound mind. This witness says that within the last year of Captain Rewell's life he told him of his property, telling him of his real estate, his notes and his stocks. This witness borrowed money of him and transacted business with him up to nearly the time of his last sickness.

Olive A. Allen tells of his having for a long time occupied a pew well to the front of the church which both he and she attended. After his marriage to his third wife he took a pew further back in the church which, she says, was in deference to the wishes of his wife. We see nothing in this to indicate either undue influence or unsoundness of mind. She tells of his being forgetful at the time of the last sickness of his second wife; that, after being told that she must be kept quiet, he would seem to forget it to the extent that he would go and speak to his wife when she ought to have been let alone and when he had been told she ought to be let alone.

Dr. H. C. Eyman, at present superintendent of the state hospital for the insane at Massillon, and formerly holding the same position in the hospital at Cleveland, an expert in mental diseases, was called in consultation with Dr. Bortz, the regular attending physician of Captain Rewell, a few days before his death. He found him then suffering from an acute outbreak of *senile dementia*. Dr. Bortz himself testifies that in his last sickness he was suffering under delusions and was very considerably out of his mind, and of this there can be no doubt.

Mrs. Jane Sinclair, of Clinton, Michigan, a sister of Captain Rewell, and Mrs. Mary Blanchard, a daughter of Mrs. Sinclair, each testified as to a visit made by him, in Michigan, during his widowhood after the death of his second wife, in which he seemed very sad and depressed, and of a visit made to them

1904.]

Cuyahoga County.

shortly after his marriage to her who is now his widow, and it is clear that at the time of this last visit he manifested great pride in his new wife, and asked them frequently if they didn't think he had just the right woman for a wife, and if they thought by any possibility he could have done better, and the like.

The testimony of these and of all the witnesses shows that during the last years of his life Captain Rewell's mental faculties were impaired; that his memory was not as strong as it had been; that he was suffering, to some degree, at least, from what the medical men call *senile dementia*, a term which sounds more fearful than it really seems to be when we get the explanation of the physicians as to what is included in the term, because they say the term includes all those symptoms of mental impairment which are incident to old age. Indeed, from what is said about it, it would seem that very few men who have passed the age of sixty years but what, in greater or less degree, are afflicted with *senile dementia*.

When the testimony of all the witnesses who testified that, in their judgment, Captain Rewell, at the time this instrument was executed, was without testamentary capacity, is weighed with that of the other witnesses, we think it clear that the jury reached a wrong conclusion in their verdict in this case.

The man who wrote the will, H. D. Messick, was a complete stranger to Captain Rewell. Rewell called upon him at the bank and asked him to draw his will. He was accompanied by his wife. Without any suggestion from anybody made at the time, he enumerated his property, omitting nothing except certain mining stock of very little value, which, upon his wife mentioning it, he disposed of in his will. That he then remembered in what his property consisted, practically all of it, seems clear from the testimony of this witness, and that he remembered those who would naturally be the objects of his bounty is clear from the will itself. He did not forget Mrs. Warden, for he made a bequest to her; he did not forget his son George, for he made a large bequest to his wife; he did not forget his wife, for he made so large a bequest to her that for that reason it is sought to set aside this will.

Mr. Keith, who was a witness to the will (Mr. Messick being the other witness), saw nothing about Captain Rewell to indicate want of mental capacity and memory. Witnesses who knew him during the years of his business life and up to the end of his life testified as to his mental faculties in such wise as to clearly indicate testamentary capacity. The fact is that up to the close of his life, or, in any event, up to the time of his last sickness, he took charge of his own business interests, which were considerable. It seems clear that he did not forget that he owned the several pieces of real estate which he did own, nor forget when the rent became due from the tenants occupying such real estate, nor did he forget the bills which he owed. It is true that in one or two instances he forgot that such bills had been paid, but he remembers that such bills had been contracted.

We are under the impression that the jury were influenced in coming to their verdict by a feeling that Captain Rewell had not done the fair thing by Mrs. Warden. We do not undertake to say that Mrs. Warden had rightly forfeited, by anything which she or her husband had done, the affection of her father. So far as appears, she seems to have been to him what a daughter should have been, but it was not unnatural that Captain Rewell, though of perfectly sound mind, should have seen fit to cut her off with the little pittance which he did because of what he believed to be the bad treatment which he had received from her husband.

If Captain Rewell had testamentary capacity, it was his right to do what he would with his own. It is a mistaken notion that children have a right to dictate what the parent shall do with his own property, and surely it is no part of the duty of a jury to determine that property shall not go as a testator desires that it should, simply because they think it would have been more equitable and just to have made a different disposition of the property.

The courts of the different states and of the United States have had occasion again and again to discuss this question of testamentary capacity.

1904.]

Cuyahoga County.

In support of what has been said about undue influence, attention is called to the case of *Mears v. Mears*, 15 Ohio St., 90, where it is held that the fact that one who is benefited by the will was so situated that he might have exercised great influence over the mind of the testator, raises no presumption that undue influence was exercised.

In *Monroe v. Barclay*, 17 Ohio St., 302, it is said that undue influence or fraud, to invalidate a will, must appear to have had some effect on the very act of making the will, by imposing a restraint upon the independent wishes and judgment as to disposition of property.

In the case of *Wise v. Foote*, 81 Ky., 10, the fifth clause of the syllabus reads:

“Influence obtained by proper persuasion and argument, or by mere appeals to the affection is not undue influence in a legal sense.”

On the question of testamentary capacity, it is well settled that less mental strength is required for the execution of a valid will than is required for the making of contracts with parties whose interests are adverse to him whose mental capacity is being investigated.

In the case of *Wilson v. Mitchell*, 101 Pa. St., 495, there is an opinion by Mr. Justice Trunkey, who announces the law as we understand it to be. On page 502 and following of the opinion in that case, this language is used:

“A man of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty. It is not necessary that he collect all these in one review. If he understands in detail all that he is about and chooses with understanding and reason between one disposition and another, it is sufficient for the making of a will. * * * If from any cause he is so enfeebled in mind as to be incapable of knowing the property he possesses; of appreciating the effect of any disposition made by him of it; and of understanding to whom he intends to bequeath it, he is without the requisite testamentary capacity. * * * He must

have memory. A man in whom this faculty is totally extinguished can not be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease. He may not be able at all times to recollect the names, the persons or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory, and vigor of intellect, to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. * * * The question is not so much what was the degree of memory possessed by the testator as this—had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it and the objects of his bounty? To sum up the whole in the most simple and intelligent form—Were his mind and memory sufficiently sound to enable him to know, and to understand, the business in which he was engaged at the time when he executed the will? * * * Neither age, nor sickness, nor extreme distress or debility of body will affect the capacity to make a will if sufficient intelligence remains. The failure of memory is not sufficient to create the incapacity, unless it be total, or extend to his immediate family or property. The want of recollection of names is one of the earliest symptoms of the decay of the memory; but this failure may exist to a very great degree, and yet ‘the solid power of the understanding’ remain.”

On page 504, in the same case, this language is used, speaking of the testator:

“The general character may be learned from one of the most intelligent (of the witnesses)—Mr. Dunlap; he knew Dougal (the testator) in 1815, studied surveying with him in 1835, was an intimate friend, was very frequently with him in the line of their business, and when Dougal ceased surveying he turned his business over to the witness. He testifies that Dougal was a strong-minded man, wrote rapidly and well, and was very tenacious of his opinions; a tender and feeling man, always glad to meet his old acquaintances of childhood; that in

1904.]

Cuyahoga County.

the last years of his life his mind was not so vigorous; that in 1880 his memory appeared to be right on transactions in the prime of his life; on these he conversed as well as ever; did not talk about recent transactions, but he asked about witness' wife; asked the same question over several times, as if he had forgotten he had asked it before; saw nothing like insanity about him, and never heard an irrational or insane expression by him, and observed no hallucination or delusion, and the witness thinks that under solicitation and well-wishers, Dougal would have readily changed his mind, and doubts if he had capacity to make a will. Surely this testimony does not show want of testamentary capacity."

In this case the testator was over one hundred years old at the time the will was made; he was blind and partly deaf; his mind was treacherous as to recent events; he would repeat the same things several times, and slept almost constantly. In his prime his mental and physical vigor had been remarkable and he had been observant of the proprieties of life, while in old age his vigor abated and he became extremely filthy in his habits. It was held that there was not evidence to show want of testamentary capacity.

A large number of authorities, cited and quoted from in the brief of the plaintiff in error, are to the same effect as those hereinbefore quoted. *Crolius v. Stark*, 64 Barb., 112; *Yoe v. McCord*, 74 Ill., 33; *Montague v. Allan*, 78 Va., 592 (49 Am. Rep., 384).

The questions raised upon the admission and rejection of evidence are numerous and have been carefully examined.

We are not prepared to say that there was not error in the ruling of the court upon some of the questions of evidence, and, if the case is retried, we suggest that the better way to ask as to the opinion of non-experts in reference to the mental condition of the testator would be to base the opinion upon the facts testified to by the non-expert witnesses.

The hypothetical question put to the physicians is very long and complicated, and, we think, can be greatly improved upon when the case is again tried. We are not prepared, however, to say that the plaintiff in error was prejudiced by the ruling upon this question of evidence.

The charge of the court, on the whole, seems to us a fair statement of the propositions of law discussed, but, under the evidence, we think there was no occasion to say anything to the jury on the question of what constitutes undue influence, for, as has already been said, we find no evidence tending to show that any influence which in any proper sense can be said to have been undue was exercised by anybody upon the testator, and hence, what was said in that regard should have been omitted.

It is possible that we should not feel justified in reversing the case on account of what was said in the charge upon that subject, because it is the law as we understand it to be, but it should have been omitted for the reasons already given.

The judgment of the court below is reversed for error in overruling the motion for a new trial and because the verdict is not sustained by the evidence.

Goulder, Holding & Masten, for plaintiff in error.

E. J. Pinney, W. H. Boyd and Henderson & Quail, for defendants in error.

WIDOW'S EXEMPTION.

[Circuit Court of Sandusky County.]

B. F. BRETZ ET AL V. LOIA A. MOORE.*

Decided, May 20, 1902.

Exemptions—Laws Relating Thereto Must be Liberally Construed—Section 5437 Construed—Widow Entitled to Dower and \$500 in Lieu of Homestead, When.

1. Exemption laws, in so far as may be necessary to effect the purpose of their enactment, should be construed equitably and liberally.
2. The provisions of Section 5437, relating to exemption to widow or unmarried minor child, are not limited to cases where the homestead is brought to a sale by the mortgagee, or by the administrator under legal process which compels a sale, but apply as well to a sale voluntarily made by the heirs and widow.
3. Where the widow and heirs, all of whom are *sui juris* and have full

*Affirmed by the Supreme Court without report, 69 Ohio State, 524.

1904.]

Sandusky County.

knowledge of the situation, voluntarily agree among themselves to sell the homestead property, with the intention of paying off the mortgage thereon and delivering the balance to the administrator of the deceased husband and father for payment of any indebtedness against the estate, the widow not having waived her right thereto under the agreement, is entitled to receive in addition to her dower interest a sum not exceeding \$500 from the fund in lieu of homestead under Section 5437, and her right thereto is not lost by reason of her abandonment of any claim to hold the premises as a homestead, or by reason of the fact that she had joined with the decedent in the execution of the mortgage; and the heirs are estopped from denying the purpose of the sale or the rights of the widow in the fund so created.

PARKER, J.; HULL, J., and HAYNES, J., concur.

This is a proceeding brought to obtain a reversal of the judgment of the court of common pleas.

We shall not undertake to state or follow all the ramifications of the various questions that have been suggested and argued, for we think that the real controlling question can be very simply stated and comes within a very narrow limit.

Loia A. Moore, a widow, was entitled to a homestead out of certain premises of which her husband died seized, under Section 5437, Revised Statutes, and it appears that these premises were mortgaged and that the mortgage was one which precluded the allowance of a homestead—that is to say, that no homestead could be allowed as against the claim of the mortgage, the husband and wife, afterwards the widow, having both signed the mortgage. The husband beside leaving his widow, left certain children, who were all of age, and it fairly appears from the record that all the persons interested in this property as heirs—these children and the widow—foresaw that they would not be able to discharge this debt and lien except by the sale of the property, and therefore they agreed together that they would sell the premises and pay all encumbrances; and thinking that the administrator of the estate of the deceased husband and father would be entitled to hold and handle the proceeds of such sale and therefrom discharge any indebtedness of the decedent, they agreed that they would turn over the residue remaining after the discharge of the mortgage debt to the administrator, and in pursuance of this agreement, they proceeded

to sell the premises and derived enough from the sale to pay off the mortgage and turn over seven or eight hundred dollars to the administrator, which they did. It turns out that probably the administrator could not have brought these premises to sale as administrator, because there were no claims against the estate which would have required it. At all events, even if he might have brought it to sale for the mortgage claim (and about that we express no opinion), he was not required to take or use any of these proceeds of the sale that were turned over to him, the mortgage claim being paid directly by the widow and heirs. But they paid over the residue to him and he holds it; and the Court of Common Pleas of Seneca County has held, and we think correctly, that he never received or held it as administrator, but, under the circumstances, he held it as trustee.

Now the widow has asserted her claim to a part of these proceeds as the value of her dower interest in this property, and that claim, I believe, is not contested. She has also asserted and here asserts her claim to the remainder of the proceeds in lieu of a homestead under Section 5437, Revised Statutes.

It is contended, however, upon behalf of the heirs, that having consented to this arrangement and sale of the premises, she thereby waived her claim to a homestead; that she thereby abandoned her homestead; and that, as a consequence, she also waived and abandoned all right to claim any of the proceeds in lieu of a homestead.

The contention by counsel for the heirs is, that it is only in cases where the property is brought to sale by the mortgagee or the administrator, or by some process of law which compels a sale of the premises, that this provision of Section 5437, Revised Statutes, relied on by defendant in error, applies, viz., "That in all cases where the homestead has been or shall be sold to pay any lien which precludes the allowance of a homestead, the residue of the proceeds, not exceeding \$500, shall be paid to the widow, or in case there be no widow, to the minor child, unmarried, in lieu of a homestead, on her or said minor child's application, in person or by agent, attorney or guardian," and that this provision of the statute does not apply to a sale voluntarily made by the heirs and the widow. But we think

1904.]

Sandusky County.

that a fair and reasonable construction of this statute authorizes an application of these provisions to a case like that at bar; that where the heirs and widow, foreseeing that a sale must be made to satisfy a claim and lien which precludes the allowance of a homestead, agree together that they can probably do better by making a private sale of the premises, and that they will do so, and that they will retain their rights in the proceeds rather than undertake to hold on to the property and allow the premises to be brought to a forced sale, as between them, it would not lie with either to dispute the equitable rights of the other arising out of such proceeding; that in a case like this, the heirs being of age, and having full knowledge of the situation, and having agreed that the premises should be sold at private sale and having participated in the sale, and agreed that the proceeds should go into the hands of the administrator, and not having required of the widow that she should waive her homestead right, or her right to the proceeds in lieu of a homestead, and it not appearing that she has waived it, but rather that she desired and still desires to retain her right, it should be held that she has not lost such right. Though she has abandoned all claim to hold the premises as a homestead, she has not thereby necessarily abandoned her right under this clause of the statute to hold a part of the proceeds in lieu of a homestead. We think the statute should receive such fair, equitable and liberal construction; that it is the policy of the law to construe these exemption statutes liberally, so as to effect this purpose, and such sale should be held to be within the purview of the statute. It was a sale to pay a lien which precluded the allowance of a homestead. Under the circumstances the heirs can not be heard to dispute that fact.

The judgment of the court of common pleas being in accordance with these views, will be affirmed.

E. B. King and George H. Nithey, for plaintiff in error.

Richards & Heffner, for defendant in error.

CLERK OF SCHOOL COUNCIL A PUBLIC OFFICER.

[Circuit Court of Cuyahoga County.]

THE STATE OF OHIO, ON THE RELATION OF GEORGE E. MYERS,
v. JOHN COON, JR.

Decided, June 1904.

Office and Officers—Clerk of School Council—Under the New School Code—Quo Warranto.

The clerk of the school council is a public officer within the purview of the new school code and of Section 8, R. S. O., and as such continues in office until his successor is elected or appointed and qualified.

WINCH, J.; HALE, J., and MARVIN, J., concur.

This is an action in *quo warranto* brought to determine whether relator or defendant is entitled to act as Clerk of the Board of Education in the city of Cleveland.

It appears that on the third Monday of April, 1902, the relator was duly elected and qualified and entered upon his duties as such clerk, under Section 3899-3, Revised Statutes, which provides, among other things, that:

“On the third Monday in April, 1896, and biennially thereafter, the school council shall elect a clerk who shall not be a member of said council, and who shall be clerk of the board of education. He shall receive a salary to be fixed by the council, which shall not exceed two thousand dollars per year.”

On the third Monday in April, 1904, the council neglected to elect a clerk; but on the following Monday night, April 25, 1904, at half-past seven o'clock in the evening, the council undertook to elect the defendant clerk of the board of education.

Meanwhile the new school code was passed by the Legislature and was signed by the governor at half-past four o'clock on the afternoon of April 25, 1904, some three hours before the election of the defendant as clerk. This new school code repeals said section under which relator had been elected, but provides that “All existing officers of boards of education and

1904.]

Cuyahoga County.

school councils shall hold their respective offices until boards of education are elected and organized under the provisions of this act, but no officer elected or appointed to fill a vacancy occurring in any such office, shall be appointed to serve for a longer period than that ending on the 31st day of August, 1905."

As the new school code, under the recent amendment of Article II, Section 16, of the Constitution (95 O. L., 962), became a law upon the governor's signing it, it is apparent that the school council had no authority to elect the defendant clerk of the board of education, unless said clerk is not an officer within the purview of the provisions of the school code last quoted, and of Section 8, Revised Statutes of Ohio, which reads as follows:

"Any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the Constitution or law."

In other words, relator claims that on the third Monday of April, 1902, he was elected to the office of clerk of the board of education for two years, at the expiration of which time, no successor having been elected, he continued in office until the new school code took effect, and that by its provisions he is continued in office until a new board of education is elected and organized under it.

The sole question for determination in this case is, therefore, whether the relator is a public officer or occupies a mere clerical position subject to removal at any time by the school council.

Meachem on Public Officers, Section 1, gives the following definition:

"A public office is the right, authority and duty created and conferred by law, by which for a given period, either fixed by law or ending at the pleasure of the creating power, an individual is invested with some part of the sovereign functions of the government, to be exercised by him for the benefit of the public. The individual so invested is a public officer."

In 23 Am. & Eng. Enc. of Law, 322 (2d Edition), under title "Public Officers," it is said:

“A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law. There are numerous criteria which are not in themselves conclusive, yet which aid in determining whether a person is an officer and whether his employment is an office. Thus, a public officer is usually required to take an oath, and frequently has to give a bond. Usually an officer is entitled to a salary or fees, but this is not necessary.

“The term ‘office’ also embraces the ideas of tenure and duration or continuance.

“Generally speaking, one of the requisites of an office is that it must be created by a constitutional provision, or it must be authorized by some statute. Official or unofficial character is to be determined not by the presence or absence of an official designation, but by the nature of the functions to be performed. Designation by the law as an officer is, however, of some significance.”

Consonant with these definitions are the following Ohio cases: *State, ex rel, v. Kennon*, 7 O. S., 546; *State, ex rel, v. Wilson*, 29 O. S., 347; *State, ex rel, v. Anderson*, 45 O. S., 196; *State, ex rel, v. Brennan*, 49 O. S., 33; *State v. Meyers*, 56 O. S., 340; *State, ex rel, v. Jennings*, 57 O. S., 415.

Let us examine the sections of the statutes which provide for the election of a clerk and his duties, in order that we may determine whether he is an officer, as above defined.

We have already seen that the clerk is to be elected biennially and to receive compensation “per year,” Section 3899-3, Revised Statutes. This indicates that the clerk’s term of office is fixed at two years.

He has certain duties prescribed by statute. He is the custodian of the school director’s bond (Revised Statutes, 3899-8). Certain claims must be approved by him (Revised Statutes, 3899-12); he must give notice of appropriations to the auditor and treasurer (Revised Statutes, 3899-14); he is the custodian of the auditor’s bond (Revised Statutes, 3899-16); bids for contracts must be filed with him, publicly read and entered in full upon the records of the council (Revised Statutes, 3899-21).

The above provisions of the statutes are taken from the old

1904.]

Cuyahoga County.

Cleveland code which has been repealed. The following duties of the clerk are provided for in sections of the statutes not repealed by the new school code:

All conveyances made by a board of education must be executed by the president and clerk (Revised Statutes, 3974). Process in suits against a board of education must be served upon the clerk or president (Revised Statutes, 3976, 4019). The clerk is required to take an oath that he will faithfully discharge the duties of his office, for Sections 3979 and 3980 Revised Statutes of Ohio, must be construed as including the clerk. In the enumeration of school children, the clerk is spoken of as an officer liable to a penalty for falsifying an enumeration (Section 4041).

The clerk of the board of education is required to give bond, payable to the state of Ohio, conditioned that he will faithfully perform all the official duties required of him (Revised Statutes, 4050). At the expiration of his term of office, he is required to deliver to his successor all books and papers in his hands relating to the affairs of his district (Revised Statutes, 4054). The clerk is held liable on his bond for failure to make return of certain statistics to the county auditor (Revised Statutes, 4061).

The new school code re-enacts many provisions as to the duties of the clerk, and adds some new duties; notably, he is now authorized to call special meetings of the board (Revised Statutes, 3978), and give notice of all school elections (Revised Statutes, 3970-11 and 3991).

It thus appears that outside of the mere clerical duties the clerk of the board of education has to perform for it and as directed by it, he has many statutory duties to perform, for the faithful performance of which he must answer to the people. These independent duties involve to a certain extent the exercise of part of the sovereignty of the state, in virtue of his election to office, and not as a mere employe, subject to the direction and control of the school council. *State, ex rel, v. Jennings*, 57 O. S., 415.

Upon the whole we therefore conclude that the relator is a public officer and was occupying the office of clerk of the board

of education at the time the new school code took effect; that there was no vacancy in said office at the time the school council undertook to elect the defendant clerk, and that his pretended election is therefore void.

The relief prayed for by the relator is granted.

M. B. & H. H. Johnson, for relator.

N. D. Baker, for defendant.

FORCIBLE ENTRY AND DETAINER

[Circuit Court of Hamilton County.]

ALONZO B. POPE v. O. E. MILLER.

Decided, December 1, 1902.

Lease too Indefinite to Constitute a Contract—Proceedings in Forcible Entry and Detainer—Where the Justice of the Peace has Been Reversed—Surplusage.

PER CURIAM.

Heard on error.

The paper writing purporting to be a lease is too indefinite and uncertain as to the commencement and duration of the term to constitute a valid and binding contract of rent for a term of years, and a suit for unlawful detention may be maintained.

When the judgment of a justice of the peace in an action of forcible entry and detainer is reversed by the common pleas court and the cause retained for trial, it is the duty of the plaintiff to file a petition in that court; but if the parties proceed to trial, without objection upon the bill of particulars filed in the magistrate's court, it is not error to found a judgment upon the statement contained in such bill of particulars.

A notice to quit the premises, signed by "O. E. Miller, agent for Kathryn Miller," is sufficient to sustain an action commenced by O. E. Miller, who is the real owner of the premises and rented the same to the defendant. The words, "agent for Kathryn Miller," will, in the absence of proof to the contrary, be treated as surplusage.

Judgment affirmed.

Henry Woost and *Chas. A. Groom*, for plaintiff in error.

F. M. Gorman, for defendant in error.

1904.]

Mercer County.

**THE RULE APPLICABLE TO A PUBLIC OFFICER AS TO
UNUSUAL EXPENSES.**

[Circuit Court of Mercer County.]

CHARLES A. KLOEB, AUDITOR, v. MERCER COUNTY COMMISSIONERS.

Decided, November Term, 1903.

Office and Officer—Duty of an Officer as an Agent of the Public—In the Incurring of Expenses in the Interest of the Public—County Auditor—County Commissioners—Mandamus.

1. A public officer is an agent of the public, and is governed as to the expenses which he may in good faith incur by the same rule that would be applicable to like acts of a private agent, or of a guardian or administrator, and is entitled to be reimbursed therefor.
2. A county auditor refused to draw a warrant on the order of the county commissioners, in payment for advertising the rate of taxation in that county, on the ground that the advertisement, if set up in compact form and charged at the rate fixed by Section 4366, would amount to \$330 instead of \$776, the charge made by the publishers and ordered paid by the commissioners. In resisting in the courts payment of the account as allowed by the commissioners, the auditor incurred legal expenses, which were admitted to have been reasonable in amount. These expenses the commissioners refused to pay. *Held:* That the auditor was justified in his action, and that the bill for his expenses in so doing should have been allowed by the commissioners, and judgment therefor is given.

NORRIS, J.; MOONEY, J., concurs; DAY, J., dissents.

This case is submitted in this court on petition in error to the common pleas of this county together with the finding of facts and conclusions of law of that court. The action was an appeal to the common pleas court from the board of county commissioners of Mercer county. In substance these are the facts:

On January 16, 1903, Chas. A. Kloeb, as auditor of Mercer county, presented to the board of county commissioners at a regular session of said board his account for expenditure by him, made in resisting certain mandamus proceedings brought

against him as such auditor. He resisted these cases up to and in the Supreme Court of Ohio. One case so brought against him was on relation of A. P. J. Snyder. The other was on relation of Gilburg and Chapman. His account is for money expended and the employment of attorneys and court costs including the making and printing of the record. The bill in the aggregate amounts to \$486.65. Snyder was the editor of the democratic newspaper and Gilburg and Chapman were the editors and publishers of the republican newspaper. Both papers were of general circulation in Mercer county, and at the request of the county treasurer of Mercer county each printed for six consecutive weeks the rate of taxation in Mercer county for the year 1898. About November 4, 1898, at a special session of the county commissioners each paper presented to the board of commissioners a bill for the publication of said tax rates. Each of said bills was for more than \$388.

The bills were taken under advisement by the board of commissioners and passed to the regular session. The bills were referred by the board to Kloeb, as auditor, for his examination and he was directed to measure the printed matter and ascertain the number of squares of straight printed matter and the number of squares of tabular or ruled work necessary to advertise said notice, and report the result of his examination to the board. Upon that examination he ascertained that said printed matter, for which said bill aggregated \$776, had been presented at the rate fixed by Section 4366, Revised Statutes, and if set up in compact form as directed by law would not amount to exceed, but would amount to less than \$165 for each paper, aggregating the total sum of \$330, and the auditor so reported to said board.

Afterwards on November 7, 1898, the commissioners allowed on each of said bills the sum of \$300, aggregating \$600, and directed said Kloeb as such auditor to issue warrants on the treasurer of Mercer county for the sum of \$300 to each, payable out of the county fund. This finding of the board was accepted by said publishers and no appeal by them or either of them was taken from this allowance.

1904.]

Mercer County.

At said date, November 7, 1898, each of said publishers presented to said auditor this order of the board of commissioners, and demanded each, a warrant for \$300 on the treasurer of Mercer county. And plaintiff in error as such auditor refused to draw said warrants.

Kloeb, at the time he refused to draw the warrants, in good faith believed that there was no authority of law for said board to issue an order in payment for the unnecessary space charged in the said bills, for the publishing of said rates, and believed in good faith that all that the commissioners were required to do was to measure and estimate the size of the printed matter, and that when so measured and estimated and computed by the rate fixed by Section 4366, Revised Statutes, all else and over was illegal, excessive and void. On November 7, 1898, no certificate was filed disclosing that there was any money in the treasury to the credit of the county fund; nor was there a certificate filed that there had been a levy made to the credit of said fund, and placed upon the duplicate in anticipation of collection and not appropriated for other purposes. Such levy however, had been made in sufficient amount and was on the duplicate for collection for the year 1898 to pay all the expenses of the county including said bills; but at said date, November 7, 1898, there was no money in the treasury to the credit of the county fund.

Said auditor in good faith believed that from all this he had no right to issue a warrant on the treasurer and charge the same to the county fund. And being of such opinion he resisted the issuing of said warrants in the Court of Common Pleas of said Mercer County and in the circuit and supreme courts. In doing so, he was put to the expense of \$486.65. It is conceded that these charges as to amount are reasonable, and that in so resisting the payment of said orders, and in the incurring of this expense, he was acting in good faith and as he understood it, in the honest discharge of his duties as such auditor, and believed he was protecting the interest of Mercer county.

Upon these facts the common pleas court found for the defendant in error, the county commissioners of Mercer county, Ohio, that:

"The said board did not err in refusing to allow said claim for said expenses in resisting the payment of said orders by refusing to issue said warrant; that there is no authority of law authorizing the county auditor to resist the issuing of an order on the county treasurer, when so ordered by the county commissioners."

The action of plaintiff in error was dismissed and the costs were adjudged against him. And upon overruling his motion for new trial the court entered its judgment on said finding.

The plaintiff in error assigns as reason for the reversal of this finding and judgment of the common pleas as follows:

First, that the court erred in overruling his motion for a new trial; second, the judgment was for defendants in error when it ought to have been for plaintiff in error; third, the finding and judgment are contrary to law; fourth, the court erred in the judgment rendered upon the facts found; fifth, the facts found do not warrant the judgment; sixth, the judgment is inconsistent with the facts found by the court; seventh, from the facts found the judgment should have been for plaintiff for the amount of his account; eighth, and other errors apparent on the face of the record.

While a county auditor "by virtue of his office, shall be the secretary of the county commissioners, except as otherwise provided by law, he shall aid them, when requested, in the performance of their duties; he shall keep an accurate record of all their proceedings; and shall carefully preserve all documents, books, records, maps, and papers required to be deposited and kept in his office" (Section 1021, Revised Statutes). Yet a county auditor is a public officer, and an agent of the people, and in this sense he is in nowise the mere clerk of the board of county commissioners. Independent of the commissioners and aside from that board and its powers and its duties, the auditor has official duties of paramount importance that he may not willfully neglect to perform, for the faithful discharge of which he stands directly responsible to the people, and for the willful neglect of which he must atone by forfeiture of office and punishment at the hands of the criminal law.

The county auditor is not the disbursing officer of the county, that is to say, he is not the payer out of the public moneys of the county; but he is the auditor of the county treasury. Except money arising from the tax duplicate he certifies all moneys into the county treasury and credits the amounts to their respective funds. He keeps an account current with county treasurer, showing all moneys paid into the treasury, when paid, to what account, and to what fund paid; and of all moneys paid out, and from what funds paid out. Except money due the state, which is paid on the warrant of the state auditor, every dollar paid out of the county treasury is paid upon the warrant of the county auditor. In performing these duties he is performing official duties—public obligations—for the faithful discharge of which his official bond, and his body standing for his oath of office, must respond. He does not act as a mere machine, without consciousness, duty, or responsibility, only to place his signature to warrants which will cause public moneys to leave the public treasury; he is not a mere automaton, there for the purpose of writing his signature to warrants on the public treasury when the button is touched. But concerning all these duties he has the right to act, and is required to act faithfully. It is his duty to exercise his judgment, concerning the official act which he is called upon to perform, to a degree commensurate with the responsibility. And it is his duty to act in good faith and with the prudence and integrity which an honest man of ordinary prudence would exercise under like circumstances; and if he willfully fails in this, then he willfully fails to perform a duty required of him by law, the penalty of which is forfeiture of office and criminal prosecution and punishment.

The very words of Section 1031, Revised Statutes, if he “willfully fails to perform any duty required of him by law, he shall, in addition to criminal prosecution therefor, forfeit his office,” imply the exercise of judgment guarded by that prudence as a public officer which confirms good faith—“If he willfully fails,” says the law.

It is the official duty of the county auditor to draw his warrants on the county treasurer for the payment of any claims

against the county allowed by the board of county commissioners, when the proper order or voucher is presented therefor. It was the duty of this auditor to issue the warrants in question in the mandamus proceedings. The court has so decided.

It was his duty to issue the warrants so far as the issuing of the warrants was a mere executive act, performed as an official duty in obedience to the mandate of legal authority. In this respect his duty was a duty subservient and ministerial. But it is going very far to declare that a public officer, who is the agent of the people, placed at the door of the public treasury, may not legally, and with effect as an official duty, lift his voice in protest and objection, to that which he in good faith, and in the exercise of his judgment as a prudent and honest agent of the people, deems to be an unlawful depletion of the public treasury; and it is going just as far to say that an order of a board of commissioners upon the auditor, to draw his warrants on the treasurer in favor of a party who is more than satisfied (and from which no appeal is taken or can be taken, because there is nobody to take the appeal), has the effect of a judgment at law, and can not be questioned at any place along the line, from the hands of the board to the vaults of the treasury.

It is true as said in *State v. Darke Co. (Aud.)*, 43 Ohio St., 311, 312:

"The performance of an official act by a public officer depends upon his legal duty and not upon his doubts; and where his duty is clear, its performance will not be excused by his doubts * * *, however strong or honest they may be."

This announcement, that the performance of clear official duty does not rest and is not dependent upon the doubt of the officer as to the propriety of its performance, is not new, and thus the doubts of an officer, as mere doubts, however strong or honest they may be, avail nothing. But that case falls far short of declaring that conditions may not present themselves which would justify a county auditor, and compel him, in discharge of duty required of him by law, to give ear to his prudence, judgment, and integrity as an agent of the people, as

1904.]

Mercer County.

distinguished from subservient performance in blind obedience to authority in its nature judicial.

Not pertinent to the facts at bar but pertinent to the principle urged and pertinent to its application in this case, would it not be willful failure of a duty required of him by law if a dishonest county auditor conspired with a dishonest board of county commissioners to loot the county treasury of the public money; and in obedience to orders of the board in that behalf, for the payment of pretended claims which he knew were false and fraudulent, he drew his warrants as fast as the orders were made, and thus, under the guise of official duty, plundered the people? Yet it is said that things akin to this have been done. But if the auditor was not a beneficiary of the fraud, and simply had acknowledged that the claims were a pretense, and the orders were the act of a conspiring board, made for the purpose of placing money from the public treasury into the hands of a false claimant, would not the auditor who knew this, and issued his warrant with such knowledge, willfully fail to perform a duty required of him by law? Surely no court would declare that he made breach of duty if he refused.

It may be said that the right of the claimant relator to the writ of mandamus must be clear, and in that behalf would be involved the honesty or the vice of his claim. But against whom would the action lie unless the official, the auditor, refused to perform the act which is urged to be to that degree ministerial, that it precludes any exercise by him of his judgment, prudence, good faith and integrity as a public servant.

In the case of *Ryan v. Hoffman*, 26 Ohio St., 109, in the opinion at page 123, the court does and did recognize, and take into account the sufficiency or insufficiency of the objection made by an officer to the performance of a clear ministerial duty, as an element in determining whether or not the duty should be performed.

And in the case of *State v. Yeatman*, 22 Ohio St., 546, it is held that an auditor may defend against an application for a writ of mandamus to compel him to issue a warrant on the treasury upon an allowance and order of the commissioners, by

showing that the order was unauthorized and that the commissioners had no authority to make it.

So it would seem that though his duty be not dependent upon his doubts, however honest and strong they may be, yet he has the right to doubt, to exercise his judgment, guarded by that prudence, good faith and official integrity, which would warrant a prudent man in his official position under like circumstances, in the conclusion that his objection and reason for refusal to issue the warrant were justified by law and would be ratified by the courts.

In the case at bar this auditor was required by the board of commissioners to measure the claims of the publishers by the rules fixed by law and to compute the space by the rate fixed by Section 4366, Revised Statutes. He did so, and found the amounts of each bill as thus measured to be less than \$165, in the aggregate \$330. He so reported to the board. In the face of this report, which is found to be true, the board allowed each claim in the amount of \$300, aggregating the sum of \$600, \$270 in excess of the true measurement as appears in the finding of facts by the common pleas court. For those sums he refuses, as auditor, to draw the warrants on the treasury. It is also found that he acted in all regards with the utmost good faith and in the belief that all that the commissioners were required to do, to determine the amount of such claims, was to estimate the size of the printed matter and compute by the rate fixed by Section 4366, Revised Statutes; and that all the amounts allowed in excess of the sums so resulting were excessive, illegal and void. With this belief, and so acting in good faith upon it, he refused to draw the warrants for the sums aggregating \$600 and made contest in the actions for mandamus, brought to compel him to issue the warrants; and in this action, upon the finding of facts, the court defeats his claim for the expenses of that litigation, because, and upon the conclusions of law, "that there is no warrant or authority of law authorizing the county auditor to resist the issuing of an order on the county treasury when so ordered by the county commissioners."

1904.]

Mercer County.

Courts have held that public officers, not idly and stubbornly and in bad faith, but where reasons actually exist, or when to a prudent man, acting in good faith, and with that degree of circumspection and discretion that a prudent man under like circumstances would exercise, reasons appear to exist which are grounds for refusal to perform a ministerial act that otherwise would be a clear official duty, such public officers may make contest in the courts against the writ of mandamus to compel him to perform. It was so held in the cases which give rise to plaintiff's claims in this action, or else those cases would have never been.

Though the refusal of the officer to act may be in violation of official duty, which requires him to perform a ministerial obligation, the contest—the appeal to the courts, the submission of the reasons for refusal, to the law—is not of itself and in itself a transgression. It is the exercise of a right, and its exercise when in good faith, and based upon the honest judgment of a prudent man, properly discharging as seem to him, under the circumstances, the functions of his office and his duties, is not and ought not draw upon him mulctary penalty, by imposing upon the individual the expense of the litigation.

If this were true, and the payment of the expenses, and whether reimbursement was to be made, followed and was dependent upon the event of the controversy, how timid would be those whose duties it is to guard the interest of the public, and to look after the honest expenditure of the public money! If the rule were thus, the people would be disarmed and non-resistant. What officer, however strong might be his convictions that the public was being wronged, and however strong were his reasons for that conclusion, would fight the battles of the public if he knew that a mistake meant the expenditure of hundreds of dollars out of his own pocket? To enforce such proposition would seem to be against public policy. If it were the law, how could these defendants in error fare in the case here and now being decided by this court adversely to them, for presuming to exercise their honest judgment, as prudent officers and honest men. The interest of the public and good

government require that it be not the law, and it is not the law.

A public officer is the agent of the public and he is governed, as to expenses made, with the good faith I have so often defined in this opinion, by the same rule that would be applicable to like acts of a private agent or of a guardian or an administrator, and is entitled to reimbursement therefor.

The judgment of the common pleas is therefore reversed, and giving the judgment which the court of common pleas ought to have given, the court here enters judgment for the plaintiff for the amount claimed, \$486.65 and costs, and the case is remanded to the common pleas for execution.

John W. Loree, for plaintiff in error.

C. E. Marsh, for defendant in error.

PRIORITY AS BETWEEN JUDGMENT LIENS.

[Circuit Court of Cuyahoga County.]

ALPHONSE J. CHARBONNEAU V. JACOB ROBERTS ET AL.

Decided, February 23, 1903.

Judgment Liens—Priority as Between—Priority Lost by Failure to Issue Execution Within One Year.

The priority of the lien of a senior judgment is lost as against the lien of a subsequent judgment by failure to issue and levy execution within one year from the date of the rendition of the senior judgment.

WINCH, J.; HALE, J., and MARVIN, J., concur.

Error to court of common pleas.

July 2, 1901, Alphonse J. Charbonneau took judgment by confession against one Joseph Roberts in the Common Pleas Court of Cuyahoga County, Ohio. The judgment debtor owned lands in said county, but no execution and levy were ever issued on this judgment.

December 2, 1901, Emily Roberts recovered judgment against said Joseph Roberts by the consideration of the common

1904.]

Cuyahoga County.

pleas court of Lorain county. Execution thereon was issued to the sheriff of Cuyahoga county, Ohio, and by him levied on the lands of the judgment debtor in controversy on July 14, 1902. August 15, 1902, being more than one year after the rendition of the judgment in favor of Charbonneau, Emily Roberts brought suit in the Common Pleas Court of Cuyahoga County to subject said lands to the payment of her judgment, making Charbonneau party defendant to said suit.

Section 5375, Revised Statutes, provides that a judgment by confession shall be a lien upon the lands of the judgment debtor within the county where the judgement is entered, from the day of its rendition, and that all other lands shall be bound from the time they are seized in execution.

From this it appears that the judgment of Charbonneau became a lien on these lands on July 2, 1901, and the judgment of Emily Roberts became a lien on July 14, 1902, but it is claimed that Charbonneau lost the priority of his lien because no execution was issued and levied on his judgment within one year of its rendition.

Section 5415, Revised Statutes, provides that "No judgment on which execution is not *issued and levied* before the expiration of one year next after its rendition, shall operate as a lien on the estate of a debtor to the prejudice of any other *bona fide* judgment creditor," and this has been the law of the state substantially in its present form since February 1, 1822. 2 Chase, 1234.

The statutory provision by which a judgment creditor is required to issue execution on his judgment and have the same levied upon lands of the judgment debtor within a specified time in order to preserve the priority of the lien of his judgment over that of other judgments was frequently before the courts in the early days of legislation on this subject; but of recent years there have been few decisions involving the application of this law. Although hardships have been pointed out as resulting from the operation of this statute and there are manifest inconsistencies in it, when we consider that it affects the priorities of judgment liens as between themselves, but not as

regards mortgage liens and other liens, yet the courts have uniformly held that these considerations should more properly be addressed to the Legislature. *McCormick v. Alexander*, 2 Ohio, 65; *Patton v. Pickaway Co. (Sheriff)*, 2 Ohio, 395; *Earnst v. Winans*, 3 Ohio, 135; *Shuee v. Ferguson*, 3 Ohio, 136; *Waymire v. Staley*, 3 Ohio, 366; *Sellers v. Corwin*, 5 Ohio, 398; *Thompson v. Atherton*, 6 Ohio, 30; *Corwin v. Benham*, 2 Ohio St., 36, 37; *Bish v. Burns*, 7 C. C., 285.

An examination of the above authorities shows that the decisions made shortly after the passage of the act referred to were fully and carefully reviewed by Judge Ranney thirty years afterward and affirmed and have been acquiesced in ever since.

There is no question that, as between the judgment liens of Charbonneau and Roberts, the former lost his priority by failing to issue execution and levy within a year.

Judgment affirmed.

W. C. Ong, for plaintiff in error.

Brewer, Cook & McGowan, Riley & McQuigg and Frank Coleman, for defendants in error.

1904.]

Fairfield County.

BEQUEST OF INTEREST IN LIFE INSURANCE POLICY WITHOUT ABATEMENT FOR PREMIUMS.

[Circuit Court of Fairfield County.]

JACOB CLAYPOOL ET AL V. JOHN R. CLAYPOOL, ADMINISTRATOR.

Decided, October Term, 1903.

Wills—Bequest of Interest in Life Insurance—Not Subject to Set-off on Account of Premiums Paid—Where the Testator Declared by Codicil—That the Bequest was Without Abatement for Such Premiums—Statutes of Descent and Distribution Not Applicable.

Where a testator bequeaths to the children of his deceased wife all interest which he has in a policy of insurance assigned by him to her in her lifetime, and the bequest is made "without abatement on account of premiums heretofore or hereafter paid by me on account of that policy," such payments of premiums can not be set-off against a note executed by the decedent and held by the estate of his wife, notwithstanding the interest in said policy and by virtue of the payment of said premiums which would inure to him under the statutes of descent and distribution.

MCCARTY, J.; VOORHEES, J., and WINCH, J. (sitting in place of Donahue, J.), concur.

Error to the Court of Common Pleas of Fairfield County.

This case arose in the probate court and was afterwards appealed to the court of common pleas. The proceeding in the probate court was brought under the statute (Section 6100, Revised Statutes), for the allowance of a claim on a promissory note given by Isaac Claypool in his lifetime for the sum of \$850 and interest in favor of Sarah A. Claypool, his wife, in her lifetime.

An answer was filed in this case which raises some issue as to the validity of the indebtedness on the note, and as to the question of the alleged set-offs that are sought to be interposed against the note arising from payments of annual premiums on the policy of insurance which Isaac Claypool assigned to his wife.

The situation from which this whole controversy arose was substantially as follows: In 1866 Isaac Claypool caused to be

issued on his own life payable to himself, his executors or administrators, a \$10,000 life insurance policy. That policy was drawn under the old form of drawing policies of insurance then existing, which provided that on failure to pay the annual premiums the policy would lapse. After some years Isaac Claypool married Sarah A. Claypool, and in 1883 he assigned to her this policy of insurance by a written instrument which conveyed to her, her executors, administrators and assigns this insurance policy. Sarah A. Claypool died about 1892 and Isaac Claypool died in 1902. The old gentleman kept up the premiums until he died—a period of about ten years. Had the premiums not been paid at the expiration of any one year, the policy would have lapsed. In this proceeding, which was instituted in the probate court, and afterwards came to the common pleas court, it was sought to recover from the claim made against his estate on the promissory note, the amount of those premiums paid during the period that lapsed from the death of Sarah A. Claypool to the death of Isaac Claypool, amounting in the aggregate to the sum of \$2,300. And the claim is made that if these items had not been paid in his lifetime that the policy would have lapsed, and he therefore paid them for the benefit of his own estate, and that these payments made by him after the death of his wife should operate as a set-off to the note, and also that whatever surplus there was between the payments made by him on those premiums and the amount of the note should be ordered to be paid to his estate by the estate of Sarah A. Claypool.

That brings us to the question as to whether those payments are proper items of set-off; and I may say in passing that there is some serious question as to whether, under the assignment made by Isaac Claypool to his wife of this policy—under that written assignment—whether he did not bind himself to keep that policy alive. That question, however, is not before us, and we need not determine it, nor discuss it at all.

Some time after the death of his wife, Isaac Claypool made what is denominated and treated here as a second codicil to his will, and it is contended that has some effect in determining

1904.]

Fairfield County.

this suit; in other words, that if Isaac Claypool, by virtue of the statutes (Section 4176, Revised Statutes), in that behalf made, is entitled, or his estate is entitled, to recover from the estate of Sarah A. Claypool by virtue of the statutes of descent and distribution, to-wit, one-half of the first \$400, and one-third of the balance of the personal property, whether he did not deprive himself of that by making a subsequent codicil, or second codicil to his will, and whether he did not give that part of his property to certain parties therein named as beneficiaries.

I want to call attention first to the assignment of this policy to his wife. It is contended that he having assigned the policy to his wife, had no longer any interest in it; and secondly, it is contended that if he had any interest in it by virtue of the statutes of descent and distribution (Section 4176, Revised Statutes), which came to him from the estate of his wife, that he released it by the second codicil to his will. I want to call attention to those two instruments. The assignment reads as follows:

“For one dollar to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer and set over to Sarah A. Claypool of Lancaster, O., all my right, title and interest in this policy No. 51254 issued by the Mutual Life Ins. Co. of New York, and for the consideration above expressed, I do also for myself, my executors and administrators guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, her executors, administrators and assigns, and their title to said policy will forever warrant and defend.

“Dated in Lancaster, Ohio, this twenty-fourth day of January, 1883.

“(Signed)

ISAAC CLAYPOOL.”

Under this assignment, which conveyed to the wife this policy of insurance, it is contended that at the death of the wife, she being possessed of this policy, that whatever belonged to her at the time of her death would inure under the statutes of descent and distribution to her husband who survived her. Assuming for the moment that that would be the situation, this

would be the right of Isaac Claypool to his distributive share in his wife's property, namely, that he would, under the statutes, receive one-half of the first \$400 and one-third of the balance on final distribution. Then what comes next, if that be true? We think this provision in his will—this codicil that I have called attention to—completely, carefully and we might say effectually, takes care of any further questions in this case. Codicil number two is as follows:

“Whereas, I, Isaac Claypool, on the 9th day of July, 1895, made my last will and testament of that date, do hereby declare the following to be a codicil to the same:

“Whereas, on the seventh day of September, 1866, I obtained a policy of insurance of that date, No. 51254 for the sum of \$10,000 on my own life; and afterwards on the twenty-fourth day of January, 1883, duly assigned and delivered said policy to my then wife, Sarah A. Claypool, since deceased, due notice of said assignment having been given to said company. My belief and intention were and are that her children herein named would succeed to and inherit her interest in said policy. Now to avoid any question or trouble, I hereby ratify said assignment, and furthermore I do hereby give and devise said policy and the moneys therein assured to all the children of said Sarah A. Claypool share and share alike, namely, Frank P. Claypool, John R. Claypool and Ada M. Creighton, without abatement or account for premiums heretofore or hereafter paid by me on account of that policy, and this provision is additional to the devises made in the foregoing will.”

Now let me read a portion of that again:

“My belief and intention were and are that her children herein named would succeed to and inherit her interest in said policy. Now to avoid any question or trouble, I hereby ratify said assignment, and furthermore I do give and devise said policy and the moneys therein assured to all the children of said Sarah A. Claypool share and share alike, namely, Frank Claypool, John R. Claypool and Ada M. Creighton.”

It seems to the court that this effectually disposes of all the questions that are in the case; not only the question as to the payment of the premiums that are sought to be charged to the estate of his wife, that come to his estate, but all other interests

that he might have in this policy, including the payments of those premiums that were made by him to keep the policy alive. He says so in unmistakable terms, and I want to observe that this codicil was very carefully drawn. It seems to the court to express every word that ought to be in it; nothing is omitted to cover the intention of the old gentleman in making the codicil. It is well known to the bar generally that the intention of the testator is to be gathered from the four corners of the will. He meant what he said.

“My belief and intention were and are that her children” (naming them) “would succeed to and inherit her interest in the policy. Now to avoid any question or trouble, I hereby ratify said assignment, and furthermore I do hereby give and devise said policy and the moneys therein assured to all the children of said Sarah A. Claypool share and share alike.”

He gives all the interest he had in that policy by virtue of his estate that would come to him on the death of his wife under the statutes of Ohio. That disposes of the policy, and that disposes of the interest he had in his wife's estate in the policy. He says furthermore:

* * * “without abatement or account for premiums heretofore or hereafter paid by me on account of that policy; and this provision is additional to the devises made in the foregoing will.”

In the first place he gives her children the whole policy, share and share alike, and secondly, provides that there shall be no abatement or account for premiums heretofore or hereafter paid.

We think this disposes of the whole matter, and that whatever estate he had in the policy he bequeathed to her children share and share alike, not only what he paid out to keep the policy alive, but what came from his wife at her death under the statutes of descent and distribution.

Therefore, we are of opinion that this alleged set-off can not be maintained against the promissory note which was allowed in favor of his wife's estate.

Finding no error in the judgment of the common pleas court, it will be affirmed without penalty and at the costs of the plaintiff in error.

C. W. McClery, for plaintiff.

C. D. Martin, M. A. Daugherty and George E. Martin, for defendants.

ACCORD AND SATISFACTION.

[Circuit Court of Hamilton County.]

BROWN-KETCHAM IRON WORKS v. L. P. HAZEN ET AL.

Decided, January 14, 1903.

Accord and Satisfaction—Liquidated Sum Due—Acceptance of Draft for Less Sum.

The law in Ohio as to accord and satisfaction does not differ from that of other states or of the federal courts in that, where a liquidated sum is due, the acceptance of a draft for a less sum in satisfaction thereof is binding as in full satisfaction, notwithstanding a want of full satisfaction.

SWING, J.; GIFFEN, J., and JELKE, J., concur.

PER CURIAM.

The facts which bear upon the question of accord and satisfaction are practically without dispute, and the question as to whether there was an accord and satisfaction or not, is the cardinal question submitted on error.

The Brown-Ketcham Iron Works made a contract with L. P. Hazen et al, whereby the latter were to do certain work for the contract price of \$1,800. When it was done, over and beyond the contract, Hazen claimed \$166.37 for extras, and Brown-Ketcham claimed \$168.35 for the use of certain tools, etc. Both items were respectively disputed. The following letter was written:

“INDIANAPOLIS, IND., May 12, 1900.

“L. P. HAZEN & Co., Cincinnati, O.

“*Gentlemen:*—Herein please find draft on Fourth National Bank, Cincinnati, Ohio, No. 69252, in amount \$469.90 in full

1904.]

Hamilton County.

payment of all demands for labor and material in any way connected with the contract and extras on building being erected by the Globe-Wernicke Company at Norwood, O., Harry Hake, architect. This draft is in full settlement.

"The accompanying papers, made out by our Mr. F. J. Vinson, fully explain themselves.

"Yours very truly,

"BROWN-KETCHAM IRON WORKS,

"J. L. KETCHAM, *Secretary and Treasurer.*"

The draft for \$469.90 brought the amount paid up to within \$1.98 of \$1,800.

Counsel for Hazen contends that as the amount paid was less than the liquidated item of \$1,800, the rule laid down in *Cumber v. Wane*, 1 Strange, 426, that when a liquidated sum is due, the payment of a less sum in satisfaction thereof, though accepted as satisfaction, is not binding as such, for want of consideration, applies, and hence the retention and use of the \$469.90 draft did not constitute an accord and satisfaction. Counsel for Brown-Ketcham contend that it did.

As to this rule, Chief-Justice Fuller said, in *Chicago M. & St. P. Ry. Co. v. Clark*, 178 U. S., 353, 365:

"The result of the modern cases is that the rule only applies when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is considered so far with disfavor as to be confined strictly to cases within it."

Also on page 367:

"And the cases are many in which it has been held that where an aggregate amount is in dispute, the payment of a specified sum conceded to be due, that is, by including certain items but excluding disputed items, on condition that the sum so paid shall be received in full satisfaction, will be sustained as an extinguishment of the whole."

In the case at bar, while the \$1,800 item was not in dispute, the "aggregate" mutual accounting was. Brown-Ketcham's extreme claim was that they could only be charged in the sum of \$1,800 less \$168.35, that is, \$1,631.65; while Hazen's extreme

claim was that they were entitled to \$1,966.37. The sum actually paid was \$1,798.02. That there was a latitude of dispute, even after this last payment, is shown by the charge of the court below, where it says:

“I do not know, gentlemen, whether or not, if all deductions are made, which side a balance would be in favor of. That, of course, is for you. Therefore I have caused to be prepared three forms of verdict.”

But it is contended, conceding the law obtaining generally in the United States to be laid down in the *Chicago M. & St. P. Ry. v. Clark*, *supra*, that the law in Ohio is different, and adheres more strictly to the rule of *Cumber v. Wane*, and reliance is had upon *Willis v. Bateman*, 1 O. S. C. D., 570, a case by our Supreme Court not officially reported.

This latter case, on its facts, is clearly within the rule of *Cumber v. Wane*, and there is nothing in it to indicate a different policy in Ohio from that followed by the federal and other state courts of limitation upon that rule to cases strictly within it.

We are therefore of the opinion that the acceptance, retention and use of the draft by Hazen, under the terms of Brown-Ketcham's letter, constituted an accord and satisfaction, and the court below erred in letting the case go to verdict.

Judgment reversed.

Cobb, Howard & Bailey, for plaintiff in error.

O'Hara & Jordan, contra.

**PAYMENT BY GARNISHEE KNOWINGLY TO ONE WHO HAD
ASSIGNED THE CLAIM.**

[Circuit Court of Logan County.]

ETTA H. MILLIGAN ET AL V. PLYMOUTH STATE BANK.*

Decided, February Term, 1904.

Attachment and Garnishment—Payment by Garnishee Upon Order of Court—Where Garnishee Became Aware of Transfer of the Claim After the Order was Made, but Before Payment—Garnishee Still Liable to the Transferee—Title—Notice.

1. A *bona fide* assignment of a chose in action passes a perfect title to the assignee without notice to the debtor, except to the extent that it is required notice be given to the debtor in order that he may not act ignorantly to his prejudice; failure of the assignee to give such notice is immaterial as against an attaching creditor.
2. In an action in attachment the garnishee is not a proper party, but sustains the relation of a witness; and where an order is made upon him to pay, based upon his original answer, he may interpose any defense he may have against the action; and if knowledge of the transfer of the claim comes to him after the order to pay is made, he may by an amended answer set up a complete and valid defense by alleging a prior assignment of the claim with want of notice and consequent mistake in the original answer.
3. Where a garnishee, before complying with an order to pay or assuming any liability, receives notice of a prior transfer of the claim, and thereafter voluntarily pays into court the amount so ordered, the fact of such payment will not constitute a valid defense, as payment *pro tanto*, in an action brought against him by the assignee of the claim.

MOONEY, J.; DAY, J., and NORRIS, J., concur.

Error to the Court of Common Pleas of Logan County.

In the original action defendant in error was plaintiff and plaintiffs in error were defendants. Their action was upon a note and mortgage. The note was dated July 5, 1902, for \$588 with five per cent. interest from date, due on or before July 5, 1902, executed by plaintiffs in error to Ellen and Christopher G. Bollman. On October 25, 1902, the note was assigned for value to defendant in error by the payees. The prayer of the

* Affirming *Plymouth State Bank v. Milligan*, 2 N. P.—N. S., 274.

petition was to recover personal judgment on the note for the principal thereof with the interest and to foreclose the real estate mortgage securing the same.

The makers of the note answered and alleged that on July 3, 1903, one Jerome Hollopeter duly commenced an action against Ellen and Christopher Bollman, the payees of said note, before one Robert Dow, a justice of the peace of this county, and in said action an affidavit for attachment was duly filed and the Milligans were made garnishees, and such proceedings were had in said action that on February 20, 1903, the plaintiff therein recovered judgment against defendants therein for \$100 and costs, and on the same day said justice of peace ordered said garnishees to pay into court the sum of \$112.50 to be applied on said judgment and costs, and, afterward, on June 23, 1903, said justice of peace made another order in said action, ordering and requiring said garnishees to pay into court \$115.75 to be applied on the aforesaid judgment and costs, and, afterward, on July 18, 1903, in pursuance of said order of said justice of peace said garnishees did pay to said justice of peace the sum of \$115.75. It is further stated that at the time of the commencement of the Hollopeter action and at all times thereafter until after the said payment, the said garnishees were not indebted to the said Bollmans in any "At the time of the said judgment before said justice of peace and of the order of said justice as aforesaid, for them to pay said money into court to apply on the claim and judgment of said Hollopeter, the defendants (the Milligans), nor either of them, had no notice or knowledge that the said note had been assigned by the payees thereof," and that the assignment of the said note and mortgage was never recorded in the recorder's office of Logan county, Ohio, where the mortgaged lands are situated. Wherefore said defendants aver that the payment of \$115.75 in the Hollopeter action is a valid part payment of the debt in the petition described and that in consequence there is due upon said mortgage debt \$502.87 and no more, which last-named sum defendants tendered to plaintiff before the commencement of this action, which tender was refused, and which amounts defendants at all times since said tender have

been ready and willing to pay. To this answer a general demurrer was sustained and defendants not desiring to plead further, judgment was rendered for plaintiff as prayed in the petition. To reverse this judgment this proceeding in error is now prosecuted.

In support of the judgment of the common pleas it is argued first, that the jurisdiction of the said justice of peace in the Hollopeter action was exhausted by the order made on the garnishees to pay of date February 20, 1903, and that the order of date June 23, 1903, is therefore invalid; second, that even if the justice of peace had *jurisdiction* to make the order still the order is not sustained by the facts in the case and compliance with it does not amount to part payment of the note sued upon. We do not find it necessary to determine whether the justice of peace had jurisdiction to make the order upon garnishees to pay of date June 23, 1903. It must be conceded that as a matter of mere jurisdiction the justice of peace had power to make *one* order. It is not denied that on February 20, 1903, that officer had jurisdiction to order payment, if the facts in the case warranted such an order. If now the second order is invalid for the reason that the first order exhausted any jurisdiction in that behalf then the first order was one that the justice of peace had jurisdiction to make. This must be so because an ineffectual attempt to exercise a conceded jurisdiction can not *exhaust* jurisdiction.

It seems necessarily to follow that as matter of jurisdiction the justice of peace had power to make the one order *or* the other. If he had power to make the first order and not the second, the garnishees merely paid *more* than they were or could be required by the justice of peace to pay. If the second order was made in the exercise of jurisdiction the amount paid is proper as to amount. In either case the justice of peace had jurisdiction to order some amount to be paid and as an amount was paid, the question is whether such payment was to any extent a part payment of the note.

The answer states a defense whether the amount paid shall be held to be a credit on the note for \$110.50 as well as if it be held to be a credit for \$115.75. Hence the correctness of

the ruling on the demurrer does not depend upon the mere validity of the second order but does depend upon the validity of either order, and the effect of the compliance by the garnishees with the one that is valid, if either be valid, would be part payment, the extent of the validity in such case as to amount being the measure of the protection to defendant below.

Defendants' answer states in legal effect that at the commencement of the Hollopeter action against the Bollmans the latter did not in fact own any claim against the Milligans; the Milligans were made garnishees in the action and for want of any notice to the contrary they believed that they were indebted to the Bollmans upon the note described in the petition. It seems, although it is not directly stated in the answer, that the garnishees appeared before the justice of peace and made answer that they were so indebted to the Bollmans at the time of service of notice, and the justice of peace acting upon this answer of the garnishees ordered them to make payment as heretofore stated. After both the orders to make payment were entered and before any compliance therewith by the Milligans they received notice and acquired knowledge that at the time they were served with notice as garnishees in the action they were not in fact indebted to the Bollmans, but by reason of an assignment of the note by the payees the same was owned and held by the Plymouth bank.

Having such knowledge and notice the garnishees nevertheless complied with the order of the justice of peace and made payment in the Hollopeter action of \$115.75 a part of the indebtedness evidenced by the note then owned and held by the bank. Were the Milligans under the circumstances authorized to obey the order of the justice of peace, and did payment in obedience to such order discharge *pro tanto* the claim against them owned in fact by the bank, are the questions in the case. These questions have not been decided expressly by our Supreme Court and the side lights supplied by our own cases and the cases decided in other jurisdictions in which similar statutes to our own are in force must disclose the proper rule here.

1904].

Logan County.

The property sought to be attached was the property of the Bollmans. This property was a debt alleged to be due or owing to the Bollmans by the Milligans. To secure this property and hold it to be applied in satisfaction of any judgment that might be recovered by Hollopeter in his action against the Bollmans notice was served upon the Milligans. The service of this notice did not confer upon the Milligans any right of property in the debt, nor any power of control of the debt, *except in so far as their own protection should require it*, that they did not have before the service of notice upon them. The Milligans could not have waived the service of notice and entered their appearance as garnishees and by such action have given the justice of peace jurisdiction of the debt they owed. *Hebel v. Insurance Co.*, 33 Mich., 400; *Blake v. Hubbard*, 45 Mich., 1 (7 N. W. Rep., 204); *State v. Duncan*, 37 Neb., 631 (56 N. W. Rep., 214).

"Garnishment is a compulsory novation which the law alone can initiate by the intervention of its own substantial appointments.

"If the garnishees had knowledge of the assignment of the debt and failed to make answer of the fact, such failure would not have affected the title of the assignee.

"The rights of an assignee can not be forfeited by action of a garnishee in the assignee's wrong" (*Johnson v. Dexter*, 38 Mich., 695, *per* Cooley, J.) Nor by the inaction of the garnishee. *Tabor v. Van Vranken*, 39 Mich., 793, *per* Campbell, C. J.

It seems that the failure of the garnishees to give notice to the justice of peace of the fact of assignment can have no different effect in the attachment proceedings so far as the assignee is concerned, when such failure is caused by want of knowledge on the part of the garnishee, than when the failure is due to the negligence of the garnishee having knowledge, unless indeed notice to the debtor of the fact of assignment is necessary to perfect the title of the assignee.

The note described in the petition is non-negotiable and the claim arising thereon is a mere chose of action. The claim however is property and the ordinary incidents of property attached to it. Among these incidents is the right of the owner

to sell it and give title to the purchaser "without waiting for the consent of any other" person. The nature of the property is such however that notice of an assignment is required to be given the debtor in order that he may not act to his prejudice upon the presumption that the claim continues to be held by the original creditor. This notice is required only for the protection of the debtor and one consequence of it is the protection of the assignee against the equitable results of the action of the debtor without notice. Except as between the debtor and the assignee, and then only to the extent indicated, a *bona fide* assignment of a chose in action without notice to the debtor passes a perfect title to the assignee. As against one claiming the assignor as creditor the failure of the assignee to give notice of an assignment is immaterial, for the right of the creditor does not rise higher than that of his debtor, the assignee. *Thaver v. Daniels*, 113 Mass., 129; *Williams v. Ingersoll*, 89 N. Y., 508; *Noble v. Oil Co.*, 79 Pa. St., 354 (21 Am. Rep., 66).

In *Dix v. Cobb*, 4 Mass., 508, 512, Parsons, C. J., says:

"An attachment creditor can not stand on a better footing than his debtor (if the assignment be not fraudulent as to creditors), and if he attaches any property of his debtor, it must be attached subject to all lawfully existing liens created by his debtor. And consequently if his debtor have no equitable interest in a chose in action, the creditor can not acquire any by his attachment. Therefore the want of notice in the trustee (garnishee) will not defeat the assignee's interest in this debt in favor of an attaching creditor."

It follows, therefore, that defendants below can urge the want of notice to them of the assignment only if and to the extent that they have acted to their prejudice in the absence of notice.

They appeared and made answer as garnishees without notice of the assignment; and they were ordered to make payment before they received notice; they did not comply with the order until after notice of the assignment was given them.

In *Secor v. Witter*, 39 Ohio St., 218, it is said:

"The order of a justice is not a judgment charging the garnishee. It does not determine the ultimate rights of the par-

1904.]

Logan County.

ties. It can only be enforced by action as in other cases. In legal effect it is an assignment of defendant's right in the claim to the plaintiff, and authorizes him to sue thereon in his own name. * * *

"In such an action the garnishee may interpose any offset or defense he may have against the action, notwithstanding the order of the justice, and no judgment should be rendered against him that will not be a protection against the rights of third persons."

It is not doubted that in many states the statutes make the garnishee a party in the attachment suit and the practice in such jurisdictions is to proceed against the garnishee in the original action and in a proper case recover personal judgment against him in that action. Such is not the practice in Ohio. To the attachment action the garnishee sustains the relation of a witness (Sections 6500 and 6502, Revised Statutes); while an order to pay may be based upon his answer (Section 6503, Revised Statutes); yet his liability to the plaintiff in attachment may be enforced against him in the absence of or contrary to his answer (Section 6504, Revised Statutes).

The fact or the substance of the answer of the garnishee is therefore not of controlling effect upon any right or remedy of the plaintiff in attachment and we have seen that the action or inaction of the garnishee can not of itself affect any right or impair any interest of the assignee. When Hollopeter commenced his action he sought to attach a debt due the Bollmans. There was in fact no such debt. Hollepeter thought there was, but he was simply mistaken. The Milligans thought there was; they also were mistaken. The justice of peace upon consideration of the garnishee's answer made an order to pay the debt due the Bollmans into court. The justice of peace was mistaken. The effect of the order would be to transfer the property in any such debt if it had existence. The order was without effect; there was no debt to transfer.

At this juncture knowledge of the mistake reached the Milligans. The Milligans had then incurred no personal liability nor sustained any loss or prejudice by acting upon reliance of their mistaken belief. The assertion by the assignee of his real title

to the debt would visit no loss, impose no liability, or in any manner prejudice any right of the Milligans. Hollopeter had in fact taken nothing by his attachment action and while he would be benefited by carrying out the mistaken order, he has no legal right to insist that the mistake should not then be corrected. If when informed of the assignment, the Milligans had refused to obey the order of the justice of peace, and if the plaintiff in attachment had brought suit to enforce it, the garnishees might "interpose any defense they may have against the action notwithstanding the order of the justice." Can it be doubted that an answer stating the prior assignment, the want of notice, and the consequent mistake in the answer before the justice would be a defense to the action. We think not.

With knowledge of this former mistake defendants below voluntarily paid to Hollopeter a fund which at the time of payment they knew belonged to the bank and to which they must have known Hollopeter had no right or title. If loss results from this payment the loss in morals and in law should fall upon the Milligans and not upon the bank.

The court of common pleas so held and its judgment must be affirmed.

Hamilton Bros. and J. A. Price, for plaintiffs in error.

E. P. Chamberlain, for defendant in error.

1904.]

Lucas County.

INJURY TO A GREEN BRAKEMAN FROM A PROJECTING SWITCH STAFF.

[Circuit Court of Lucas County.]

LAKE SHORE & MICHIGAN SOUTHERN RY. CO. v. GEORGE FISHER.*

Decided, January Term, 1893.

Negligence—Railway Brakeman without Experience and Unacquainted with the Road—Struck by a Switch Staff and Injured—Finding of the Jury in His Favor Upheld.

F, a farm hand, without experience in the operation of trains, was employed as a brakeman, and two or three days thereafter, while clinging to the side of a freight car in a moving train in the evening, was swept off by a projecting switch staff and injured. The train was started while he was on a cut of cars which had been thrown onto a side-track, and was moving at the rate of three or four miles an hour, when his superior called to him to hurry and get on or he would be left. There was a light burning on the switch staff, which was located 100 or 150 feet from the point where he grasped the handhold on the car, to which he hung in an awkward way with his foot in the stirrup until the switch staff was reached and he was struck.

Held: That F could not, in view of his inexperience and lack of knowledge of the road, be charged with notice as to the location of the switch staff or the danger which he was incurring, and that under all the circumstances the finding of the jury that he was entitled to recover should be upheld.

BENTLEY, J.; SCRIBNER, J., and HAYNES, J., concur.

Error to Court of Common Pleas of Lucas County.

This cause is in this court upon a petition in error to reverse the judgment of the court of common pleas upon a verdict rendered in favor of Mr. Fisher and against the railroad company, for personal injuries received by Mr. Fisher while in the employ of the railroad company as a brakeman, at Rockport, near Cleveland.

Mr. Fisher was a young man of thirty-one years of age, residing in Ottawa county, and was a farmer. He never had been

* Affirmed by the Supreme Court without report (*Railway Co. v. Fisher*, 51 Ohio State, 574).

in the employ of any railroad company before, nor done any railroad business until January 17, 1890. At that time for some reason he seems to have left his farming occupations, and applied to the Lake Shore company for employment as a brakeman. He was employed by the company, and went to a place rejoicing in the name of "Whiskey Island," near Cleveland, to begin his employment for the railroad company—perhaps to get a good start. He got there, I believe, on January 18.

In doing some work his train passed through this town of Rockport; that seems to have been in the evening when he was there; and leaving Rockport in the night, or evening, he came west with his train on that day, the train being bound for Toledo. For some reason he left the train at LaCarne, and the train pulled out and left him there.

The circumstances are not detailed as to how that happened, only as it may be gathered from various statements in the record as to how it might have happened. He went home from LaCarne, and on January 20 started back to Cleveland on a freight train, and arrived at Rockport in the evening of January 20.

In the train upon which he was acting as head brakeman were a half-dozen cars of stone, which were to be left at Rockport, or at least switched there; and the engine, after the cars had been properly uncoupled, backed these cars of stone upon the side-track, and while it is not exceedingly clear from the testimony, it would seem that this young man rode the cars on that switch and the brakeman stopped them.

He says it was dark, and he did not know whether there were any other cars on the switch or not, but fearing there might have been he had to be very cautious lest it might collide and knock him off and injure him. But he performed his duties upon these cars, and by the time he was ready to get off of them his train started to pull out of the station, or the place where it then was; and one of the employes upon the train, seeing him upon the ground and his train starting, told him to hurry up and get on or he would be left again.

Thereupon he ran to the train, came up to a box car at the side of which was an iron stirrup projecting below the car, as is usual, and, having his lantern upon his arm, he grabbed at

1904.]

Lucas County.

the armhold and put his right foot in the stirrup. The train was bound for the east, and he was upon the north side of the train, and he approached one of the corners of the box car. The manner in which he attempted to get on, with his foot in that stirrup, would afford some light on the degree of experience and sense he had in getting onto the freight car. The iron ladder of the car provided for brakemen to mount to the roof, was adjusted around the corner on the hind end of the box car, in the usual manner, and instead of putting his left foot in the stirrup, with his hand hold of the handhold, and spring around to the ladder, either from excitement or greenness, or in some way, it seems he caught or put his right foot there. The cars at that time were pulling out and were going perhaps three or four miles an hour at that time, and it being a down grade their speed was noticeably increasing.

At the place where he attempted to board this car in the manner indicated—or rather ahead of this place from 100 to 150 feet—there was a switch staff standing between the double tracks. Upon this upright switch staff was an iron flange, and above that and sitting upon the top of the staff was a lantern provided with green lights. The flange and the staff and the lantern came up higher than the lower corner of the box car. The switch staff was so arranged and placed there that when the flange was turned so that it should stand perpendicular to the cars that were passing along there, the edge of the flange would come somewhere from fifteen to twenty inches from the side of a box car.

Some persons saw Mr. Fisher as he caught onto the side of the car in that way. And instead of swinging immediately around to get upon the ladder at the rear of the car, he seems to have hung there at the side of the car, almost at arm's length, for some reason, with his lantern upon his arm. In the meantime his car was rapidly approaching this switch light, and two or three persons, appreciating his danger, hollered at him and warned him of the danger which they saw he was approaching. Mr. Fisher either did not hear the warnings given, or seems not to have understood them; at least he did not change his position until after the car had arrived at this switch staff and

he was struck and knocked off the car, and run over, and injured.

Under circumstances of that kind the jury awarded him a verdict against the defendant railway company, it being charged that the company was negligent in thus placing the switch staff so near the passage of these cars as to endanger their employes, and that from that negligence the plaintiff below was injured.

It was claimed upon the part of the company that it was proper and necessary to place a switch staff in that position, and that it was usual along the line of the road; that the young man was warned when he entered the employment of the company to look out for switch staffs, among other things, and to generally look out for danger; that if he had looked ahead when he mounted this car he could have seen this green light and the switch staff, and would have escaped the danger, either by dropping off the car, not mounting it at all, or getting on at the other side; and that he was negligent in not paying any attention to the warning that he received, and that therefore he ought not to be allowed to recover damages against the company.

The testimony, as I have indicated, shows that this young man Fisher had no prior experience in railroading prior to his experience beginning on January 17. We should gather from the record and all the testimony that he was perhaps what is ordinarily termed "green," perhaps more so than usual.

The defendant in error in the hearing before us cited to us a great number of cases showing that courts in other states had sustained verdicts against a railroad company under similar circumstances; cases that hold that it was negligence for the railroad company to allow a structure to be placed so near the passage of the cars as to endanger their employes in getting on and off, and where it was expected they would get on and off—many cases that hold that it is not necessarily one of the perils which the employe of a railroad company assumes when he enters the employment of the railroad company.

On the other hand, counsel for the railroad company cited quite a large number of cases where it has been held that under

1904.]

Lucas County.

the circumstances presented in those cases the employe could not lawfully recover. We have taken the pains to look up and consider all the cases thus cited by counsel for the railroad company, to see whether the cases therein considered were such as the one here at bar. I will very briefly indicate what we found the nature of those cases thus presented to be.

DeForest v. Jewett, 88 N. Y., 264, was a case where there were open ditches, plain and easy to be seen, along the railroad so that the employe could see them, and he had been employed some time; the court found that they were such structures and dangers that he either actually knew of them, or were such as he was bound to know from the employment that he had had around them.

In 99 Pa. St. is a case where there existed a coke bridge for wheeling over coke, and was made to extend over the railroad; and the employe in that case was riding on the top of a car and was struck by this bridge and injured. The court found in that case that from the number of times that he had passed there in his employment upon the train, he must be chargeable with knowledge or at least with notice of the bridge, and that he could not pass it in safety.

In 50 Mo. is a case which was also in regard to an overhead bridge. The court found from the record that the employe had worked there before, and under such circumstances he was chargeable with knowledge of the situation of the bridge and of its dangerous character.

Gibson v. Railway Co., 63 N. Y., 449, is a case of the depot extending over so that brakeman could not stand upright upon the top of a freight car, in the middle of it, and not be injured. And the court found from the situation there, and the knowledge of the employe, that he himself was negligent in assuming the position he did at the time the car passed under the roof, or so near the roof of the depot.

Wells v. Railway Co., 56 Iowa, 520 (9 N. W. Rep., 364), is also a case of an overhead bridge, and this had been known to the plaintiff for many years prior to the accident of which he complained.

Smith v. Richards, 155 Mass., 79 (28 N. E. Rep., 1132), is a case of an engineer leaning far out from his engine for the purpose of observing the track or watching for signals, and there was a signal post so near that as the engine passed it, it struck him and injured him. The court in that case recite the fact, however, that along the line of his run there were quite a number of such obstructions so near the track, and that while perhaps it was not certain that he had actual personal knowledge of this particular post, yet he had knowledge of many such obstructions, presenting such dangers, and from his experience with those he was chargeable with notice that he might expect this post, and therefore he was negligent in not providing for his own safety in passing it.

Rains v. Railway Co., 71 Mo., 164, is also a case of overhead bridge, and the court recites that the record shows that the person had passed under it, to and fro, a great many times, and that under such circumstances he must have known about it.

Clark v. Railway Co., 28 Minn., 128 (9 N. W. Rep., 581), is a case where an elevator roof projected in such a way as to hit a person riding along upon the cars of a railroad company. There it appeared that the plaintiff knew it would strike any person standing upon a car as he was standing, and that, although the railroad company might have been negligent in building or allowing the elevator roof to be used in such a manner, yet in the particular case the man himself who was injured was chargeable with negligence.

In 39 Iowa, also cited, was a case where a brakeman coupled cars when they were going too fast. He was warned just before that, in the danger in so doing. He had knowledge of the situation of certain bumpers on the cars, and, in spite of the warning given him then and there, and in spite of his knowledge of the situation of the bumpers and that they might not hit each other sufficiently to stop the cars coming together, he undertook to couple them; and the court held that he was chargeable with notice, under such circumstances, that the one might override the other and be dangerous for him to attempt to couple them under such circumstances.

1904.]

Lucas County.

In fact, all these cases cited by counsel for the railroad company are cases where the court found that the injured employe either had actual knowledge or was chargeable with actual knowledge of the situation of these obstructions and the danger attending the passing of them. It appears that the mere fact that such dangers are along the line of the road does not necessarily impose the risk upon the employe who takes employment from the company under such circumstances; that is, that the dangers arising from these things are not necessarily such dangers attending the employment generally as he assumes the risk of incurring. It becomes in each individual case a matter of knowledge, or such circumstances as charge notice upon the injured employe.

So, in this case, we think the inquiry is narrowed down to this: whether this young man, Fisher, under the circumstances in which he was placed (his experience and all that) had knowledge of such an obstruction, or whether he had knowledge of such facts and circumstances as would charge him with notice, and to forbid his recovering.

Now, it is said that, at the time he mounted this freight car, he might have seen this switch light—he might have seen the switch light if he had looked ahead. But we think it does not clearly appear that, if he had seen the switch light ahead, that he would have instant knowledge of the distance between it and the car when the car should reach it.

Consideration is also to be had of the situation under which he mounted the car. He was inexperienced; perhaps somewhat excited. He was told to hurry; he saw his train leaving, although he had been engaged in braking and switching the cars, as was his duty; and had completed that as soon as he could and started to take his train again; and yet, in the meantime, without any reference to him, the train had started on, and had already obtained a velocity of some four miles an hour. Under these circumstances, his superior told him to hurry up and get onto his train, or he would be left again. He did hurry up, and grabbed this car handhold. He says that, almost instantly, it seemed to him he was struck by this switch staff and knocked off the car.

The testimony, on that feature of the case, shows that he might have been 100 to 150 feet away from it when he first took hold; and the train was going somewhat rapidly and increasing in speed. It is not certain that he did not have in his mind the danger to which he was exposed, and that, while he might have heard some one shouting, it conveyed no distinct and definite warning to him as to what it was necessary for him to do in order to escape any injury. In this respect, we think the case was fairly left to the jury to determine whether on not he was chargeable with knowledge and notice of the danger, and whether he was himself negligent, under the circumstances, in mounting the car and remaining where he was.

The manner in which he put his foot into the iron stirrup would necessarily have caused some delay, even if he knew the next movement he should make, and even if he knew the danger to which he would be exposed if he did not get around on the back end of the car; that is, by changing or swinging around and getting upon the ladder. The time that elapsed from the time he placed himself in that position till this switch staff was reached was very short at least, although the train may have run even 130 or 150 feet. It is a comparatively short time that would be required for it to reach the switch staff.

Now, this being the first time that he had passed along there, as is shown by the evidence, and his inexperience and want of knowledge, we think the jury were fairly warranted in finding that he really did not know the position of that switch staff, and that it would be going too far to say that he knew such facts and circumstances as absolutely charge him with the duty of knowing it was there and was dangerous.

He says he had seen switch staffs between the tracks at Elyria, but, so far as he had observed, they were much lower than this one and did not present the same dangers.

In view of the record in the case, we would not feel at all justified in setting aside the verdict of the jury upon this ground—that they should have found that it was the duty of this young man to have known the situation there, and

1904.]

Lucas County.

should not have placed himself in a position of danger. It is said by the railroad company that it could not be charged with negligence in placing the switch staff there—that it was necessary to have it there. But, however that might be in fact, the testimony in this record would not indicate that it was absolutely necessary that it should be so situated. We are unable to say, from the testimony here, although the fact may be true, that it would not be entirely practicable for the tracks to be placed wider apart at that place, so that the switch staff could be placed further away from the cars. It is said that, if it is placed at a different place, it will necessitate a longer rod to work it; and, therefore, additional danger to employees and persons passing there. This is the statement of one of the witnesses for the railroad company, while there is no explanation of how he arrives at that, or why it would necessarily be dangerous to place the switch staff a little further from the track. If the rod was longer, it would seem that the jury might have come to the conclusion that it could be made a little heavier and thus enable the switch staff to be operated to advantage a little farther off.

There is some testimony attempted to be produced on the part of the railroad company that there were other switch staffs along the line of this road substantially like this one, and that, therefore, this young man was chargeable with notice that he might expect to find them anywhere along the line. Now this record does not indicate that this young man had passed any such switch staffs. There was some general statement that they used switch staffs, somewhat of the general plan of this, along the run of particular witnesses, who so testified; but there was no pointing out of any particular places where such a switch staff was placed, or that it occurred in or along the line where this young man had passed.

We do not mean to say or hold that, as a matter of fact, it is and must be dangerous for a railroad company to maintain a switch staff of this character this near to the track or between two tracks so that they come this near to passing cars.

But from the record and testimony presented in this particular, we fail to find that it was the duty of the jury

to conclude that that was a necessary and proper place to maintain such a switch staff.

As to the warning the company claim the young man had at the time he took the employment, it is shown by a written statement, introduced in evidence by agreement, as to what Mr. Fisher was told when he entered the employment of the company, the statement being substantially this: that he was a new man and was warned to look out for overhead bridges, switch standards, etc., in making couplings.

Now, suppose a young man, without any knowledge in railroad matters, fresh from the farm where he had passed thirty-one years of life, and, hiring out to the railroad company, is told to look out for switch staffs. To him it would be scarcely any warning at all. If it were shown that he had been told, or knew, the line of railroad where he had to run, and that there were switch staffs coming so near that, if he should hang on the side of a car it would be apt to hit him, it would be a different matter; but the warning referred to would convey no adequate idea of the dangers to the young man.

As to the objection made to the charge of the court, and its refusal to charge, the railway company presented two requests to the court, the first being as follows:

“The plaintiff was in the defendant’s employ as a brakeman on its freight trains, and as such was engaged in the performance of a service that was hazardous and perilous; and while so engaged in the performance of his duties as such, it was his duty to be careful and cautious himself, and on the watch and lookout for dangers; and if, whilst so engaged, he was negligent in the performance of his duties, and such negligence contributed to produce the injury, he can not recover.”

When the court came to consider this request, this was said: “We have charged, as we think, the first request: If the plaintiff himself was negligent in the performance of his duty, he can not recover.”

The only material difference, if it be material, between that the court did say and this request, is, that the court only said that it was his duty to be cautious, and that, if the

1904.]

Lucas County.

plaintiff himself was negligent in the performance of his duty, he can not recover; while the additional statement is made in the request that he must be on the watch and lookout for dangers.

This matter was not specially argued before us, but it is presented in the record. We think that, for all the substantial purposes of the case, the material part of this request was given. If there was any particular stress to be placed upon this, to look out for dangers, it would amount to nothing in this case, except that the jury should understand that he was to look out for this particular danger. Whether he was to look out for this particular danger would depend upon his knowledge of the warning given him, and all the circumstances of the case and the other matters to which his attention must be directed, and was a matter for the jury to consider.

The second request is:

“If, whilst engaged in his duties as a brakeman, it became necessary for him, as a part of his service, to go upon the side of a car of a moving train, it was his duty to look ahead in the direction the car was moving, to see if there was any obstruction or danger ahead which might imperil him, and if he neglected so to do, and was injured in consequence of such neglect, he can not recover.”

Now, it appears plain and direct in this record that he did not look ahead when he got on to this freight car, and if the court should have given this request, it would have been equivalent to saying that the plaintiff below could not recover in this particular action, because he did not look ahead.

We think it can not be said, as an absolute rule of law, that the plaintiff must look ahead under all circumstances. It is his duty to be cautious and careful; but whether he must look ahead or behind or to one side or down or up depends upon the particular situation in which he may be placed at the time. And when he was riding upon that car, in the position he then was and perhaps a little “green,” as I say, holding on to the outside of the freight car when the train was in rapid motion and gaining headway every minute, and

he, being somewhat perturbed, he could not exactly understand how he was going to get out of his peril, and before he could gather his wits to determine whether he should look at his feet or around him and ahead of him, he may have been struck by this switch staff.

We think, under such circumstances, it would have been going too far for this court to say to the jury that it was absolutely his duty before he got upon the car to look ahead for danger.

With that view of the case we will not disturb the judgment below, and affirm the same, with a certificate that reasonable cause for these proceedings in error existed and no penalty will attach.

Emory D. Potter, Jr., for plaintiff in error.

Hurd & Scribner, for defendant in error.

INTERSTATE COMMERCE AND MUNICIPAL LICENSE FEES.

[Circuit Court of Coshocton County.]

IN RE OSCAR JULIUS.

Decided, May Term, 1904.

Interstate Commerce—What It Is—Goods Not Subject to State Taxation, When—License Tax, a Tax on Goods—And a Direct Burden on Interstate Commerce, When—Ordinance of Municipality in Conflict with Section 8 of Article I of the Constitution of the United States, When.

1. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. Such commerce is not subject to state taxation, even though there be no discrimination between it and domestic commerce. The sale in one state of goods manufactured in another state is interstate commerce and not subject to state taxation.
2. A manufacturer of goods which are legitimate subject of commerce, who carries on his business of manufacturing in one state, can send an agent into another state to solicit orders for the products of his manufactory without paying to the latter state or a muni-

1904.]

Coshocton County.

- cipality within such state a license for the privilege of such soliciting to sell his goods.
3. A license tax required for the sale of goods is in effect a tax upon the goods themselves.
 4. A license tax imposed by a municipal corporation within one state upon an agent of a citizen of another state, for the privilege of selling or seeking to sell his goods in the former state, is a direct burden on interstate commerce, and, therefore, beyond the power of the state and of the municipality thereof.
 5. An ordinance of a municipality of this state, under which a license fee is required from the agent of a portrait company residing in another state for the privilege of canvassing for orders for the copying or enlarging of pictures to be manufactured by said company in said foreign state and delivered to customers in said municipality, is in conflict with Section 8, Article I of the Constitution of the United States, and, therefore, void.

VOORHEES, J.; DONAHUE, J., and McCARTY, J., concur.

This is an application on the part of Oscar Julius to the judges of the circuit court of this county for a writ of habeas corpus. The petitioner was arrested upon a warrant issued by the mayor of the city of Coshocton, in the county of Coshocton and state of Ohio, based upon an affidavit charging that "said Oscar Julius, on or about the 21st day of December, A. D. 1903, at the city and county aforesaid, unlawfully did violate the license ordinance of said city in this, to-wit, by canvassing in the corporate limits of said city, for orders for the copying and enlarging of pictures in what is known as portrait photographing, which copying and enlarging was not to be the product of the hands of the said Julius nor was said work to be done within the limits of said city, but was to be done by the Chicago Crayon Company, a corporation under the laws of Illinois and located at Chicago, Illinois, of which said Julius was an employe, no license having been obtained from the mayor of said city by said Oscar Julius or said corporation, which act was contrary to the ordinance in such case made and provided." To which affidavit the defendant demurred. The demurrer was overruled and exceptions taken. Thereupon the defendant entered a plea of not guilty, waived in writing a trial by jury and submitted to be tried by the mayor. Upon trial he was found guilty as charged in said affidavit, and it was ordered and adjudged by

the mayor that defendant pay a fine of five dollars and costs of prosecution, taxed at three dollars, and stand committed to the city prison until the fine and costs were paid, or discharged by due process of law. To which order and judgment of the mayor the defendant then and there excepted. Defendant filed his motion for a new trial, which motion was overruled and exceptions taken. Thereupon the defendant applied by petition to this court for a writ of habeas corpus, on the ground that he was unlawfully restrained of his liberty by reason of such conviction, fine and imprisonment, for the reason that the ordinance and the statute of the state under which he had been arrested, tried, convicted and sentenced, were in conflict with the Constitution of the state of Ohio, and with the Constitution of the United States. A writ of habeas corpus was issued by one of the judges of this court at chambers for the production of the body of said Oscar Julius before the circuit court in and for said Coshocton county, on the first day of its next term to be held at Coshocton, May 10, 1904. At said May Term of the circuit court the cause was submitted upon the petition, exhibits, and an agreed statement of facts.

After what has already been stated, it will be sufficient for the determination of the law of this case to say, that from the agreed statement of facts it appears that the defendant was on the 21st day of December, 1903, canvassing said city of Coshocton, going from house to house, showing samples of portraits and soliciting orders for similar work to be sometime thereafter delivered and paid for; that he was acting as the agent and employe of the Chicago Crayon Company, a corporation duly incorporated under the laws of the state of Illinois, and engaged in the making of portraits in oil, crayon, India ink, water colors and pastel, said portraits being made in the city of Chicago, Illinois, and sold by the agents of said company in various states of the United States, including the state of Ohio; that no license was procured by said defendant or said company from the mayor of said city of Coshocton, as required by its ordinance; that said defendant did not deliver any goods, wares, or merchandise for any purpose in said city of Coshocton, nor did he receive any money in payment for any

1904.]

Coshocton County.

such articles; that said portraits were not to be the product of said agent's own hands, nor was the work to be done in the corporate limits of said city, but the work was to be done in the city of Chicago, Illinois, where said corporation is located; that said portraits when made were to be shipped from the city of Chicago to the city of Coshocton, and there delivered to the persons ordering the same, and upon said delivery payment was to be made; that said Oscar Julius is a non-resident of the state of Ohio and is a citizen of the state of New York.

The arrest was based upon an ordinance of the city of Coshocton passed April 29, 1902, and known as Section 125 of the Revised Ordinances of said city. Said section is as follows:

"It shall be unlawful for any person, persons, firm or corporation to canvass within the corporate limits of the city of Coshocton, Ohio, for orders for the copying or enlarging of pictures in what is known as portrait photographing, except the same shall be the product of his or their own hands, and the work done within the limits of the city of Coshocton, without first procuring from the mayor of said city a license so to do, and shall pay for said license at a rate of not less than one dollar, nor more than twenty dollars per day, and any person, persons, firm or corporation who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof before the mayor, shall be punished by a fine of not less than five dollars nor more than twenty dollars, at the discretion of the mayor."

It is contended by counsel for the petitioner that the ordinance, as well as the act of the Legislature conferring licensing power upon municipal councils, Section 2669-6, Revised Statutes of Ohio, upon which act the authority to pass such ordinance is based, are in conflict with that part of Section 8, Article I of the Constitution of the United States, which provides:

"The Congress shall have power * * * to regulate commerce * * * among the several states." * * *

Counsel for the city contend that canvassing a city, showing samples of portraits and soliciting orders for similar work to be sometime thereafter delivered and paid for, although the canvasser is the agent and employe of a non-resident person

or corporation, by whom the work is to be done out of the state of Ohio, do not come within the meaning of commerce as that word is used in the above section, and that the state, and by its authority, a city council by ordinance has the right to protect their citizens, laborers and markets against an invasion of such products.

In *County of Mobile v. Kimball*, 102 U. S., 691, 692, commerce is defined as follows:

“Commerce with foreign countries and among the states strictly considered consists in intercourse and traffic including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.”

In *Brennan v. Titusville*, 153 U. S., 269, a maker of portraits and picture frames in Chicago, Ill., had sent his agent into the state of Pennsylvania to solicit orders for pictures and picture frames, by going personally to citizens and residents of that state. Upon receiving orders for pictures and frames the agent forwarded such orders to the manufacturer in Chicago, where the goods were made and shipped by him to the purchaser in Titusville by railroad freight or express, the express companies or the manufacturer's agents collecting the price of the goods and forwarding the amounts to him at Chicago. The ordinance of the city of Titusville required that persons so employed in canvassing or soliciting in the city should procure a license from the mayor, paying therefor certain sums fixed by the ordinance, but providing that its provisions should not apply to persons selling by samples to manufacturers or licensed merchants or dealers residing or doing business in said city. The court held that the license tax imposed by the ordinance was a direct burden upon interstate commerce and was, therefore, unconstitutional and void.

It is not competent for a state Legislature or a municipality by ordinance to discriminate against such commodities or goods, or declare that they are not articles of traffic and commerce and by unfriendly legislation exclude them from the state. The sale and delivery in one state of goods manufactured in another

1904.]

Coshocton County.

state, by a citizen of that state, is interstate commerce. On this proposition it is sufficient to cite *Cooper Manufacturing Co. v. Ferguson*, 113 U. S., 727; *Robbins v. Shelby County, etc.*, 120 U. S., 489; *Horn Silver Mining Co. v. New York*, 143 U. S., 314; *Brennan v. Titusville, supra*; *Colt v. Sutton*, 102 Mich., 324.

The decisions of the Supreme Court of the United States are controlling. They forbid the exercise by the Legislature or the municipality of the power claimed by the city solicitor in this case. Hence his construction of the statute and ordinance can not be maintained, because it would result in a conflict upon a question where the authority of the general government is paramount to the governments of the state. To give a state Legislature power to legislate in such cases requires an act of Congress to that effect. *Leisy v. Hardin*, 135 U. S., 100; *Welton v. Missouri*, 91 U. S., 275.

The police power is reserved to the states, and they have the right to regulate internal trade so as to protect the health and public welfare of the people, but this power can not be so extended as to encroach upon interstate commerce. Whether any particular act does so encroach or not is a question for the courts, and in the determination of that question the Supreme Court of the United States refuses to be bound by the opinion of the state Legislatures or the state courts. If the act is in itself an encroachment upon interstate commerce, though expressed to be a regulation under the state police power, the federal courts hold it unconstitutional. *Leisy v. Hardin, supra*; *Minnesota v. Barber*, 136 U. S., 313.

The ordinance in question is not a police regulation, but is an attempt to prevent, or at least discourage, the importation and sale of goods manufactured in another state, and thereby protect citizens, laborers and markets within the limits of the municipality against such goods. If the municipality or its citizens are in a condition to require such protection, the appeal for relief must be made to Congress, which body alone has the power to legally grant such relief. *In re Roher, Petitioner*, 140 U. S., 545.

It is urged by counsel for the city to relieve this ordinance from these constitutional objections that the license imposed is not a tax upon the goods, but only a license fee charged as a police regulation, and, therefore, does not come within the constitutional inhibition. It is well settled that in legal effect the money paid for a license to sell goods is a tax upon such goods. *Brennen v. Titusville*, *supra*; *Brown v. Maryland*, 12 Wheat., 419; *Welton v. Missouri*, *supra*; *Leloup v. Mobile*, 127 U. S., 640.

In the case of *Caldwell v. North Carolina*, 187 U. S., 622, it was held that "an ordinance under which a license may be required from the agent of a non-resident portrait company, who received from such company pictures and frames manufactured by it to fill orders previously obtained, and after breaking bulk and placing each picture in frame designated for it, delivered them to the respective purchaser, is invalid as an attempt to interfere with and regulate commerce." We think this case is on all fours with the question here and is conclusive against the validity of this ordinance.

We are not required in this case to pass upon the validity of this ordinance so far as it might affect citizens of our own state. We are disposing of the ordinance as one that interferes with interstate commerce, and for this reason we hold that it is in violation of Section 8, of Article I of the Constitution of the United States. The conviction of the petitioner herein is wrong; the affidavit does not charge him with any act in violation of any law of the state or ordinance of the city, that could be enforced against him. The writ is allowed. The petitioner is dismissed from custody at the costs of the state. Petitioner discharged.

Charles B. Hunt and *T. B. Roche*, for petitioner.

Howard E. Hahn, City Solicitor, contra.

1904.]

Franklin County.

SUIT IN ATTACHMENT ON A PROMISSORY NOTE.

[Circuit Court of Franklin County.]

OSCAR ORLOPP V. SCHUELLER, ADMINISTRATOR.

Decided, October 23, 1903.

Promissory Note—Suit in Attachment Upon—Administrator Holding an Undetermined Legacy—Made Garnishee—Jurisdiction of Probate Court is Interfered with Thereby—Common Pleas Court can not Order Administrator to Pay Money, Until—Jurisdiction not Lost by Failure to Make Order—Conflicting Dates in Petition—Purpose of Section 5522 Requiring the Nature of Claim to be Set Forth in an Affidavit for Attachment.

1. A writing setting forth that, "I hereby certify to have received of D a loan for three months, \$500," with date and place of execution and name of maker, constitutes a promissory note upon which an action may be maintained.
2. An attachment issued in a suit upon a promissory note is not insufficient in law because the date of the note is differently stated in the petition and the amended petition.
3. An administrator may be made the garnishee in such a case where it appears upon the filing of his final account that the contingency of lack of funds to pay the legacy or a part thereof to the defendant is not likely to arise; such a process does not interfere with the settlement of the estate, nor is the legacy withdrawn from the custody of the administrator.

SULLIVAN, J.; WILSON, J., and DUSTIN, J., concur.

Error to the Court of Common Pleas of Franklin County.

On January 8, 1902, defendant in error brought suit against plaintiff in error, in the Court of Common Pleas of Franklin County, to recover from plaintiff upon a certain paper writing, designated in the petition as a promissary note, averring the same to have been executed by plaintiff in error about the year 1875, in the sum of \$500, payable to the defendant's estate, and that he was unable to state the date at which said note matured or the rate of interest it bore, but that the same was past due.

It was further averred that plaintiffs, in 1878, removed from the state of Ohio to the town of Atcheson, in the state

of Kansas, and is now, and ever since the year 1878, has lived beyond and without the jurisdiction of the state of Ohio; that through some inadvertance said note had been either lost or mislaid, but that, in a reasonable time, a copy thereof would be filed with the court. Then followed the averment that no payments had been made on said note; that there was due defendant in error on the same \$500, with interest from 1875; that by the last will of Oscar Orlopp, late of Franklin county, deceased, plaintiff in error was named as legatee; that the estate of said deceased testate was solvent; that the property bequeathed to plaintiff in error was within the county of Franklin, state of Ohio. Defendant in error prayed for a personal judgment for amount of said note, and interest thereon from 1875.

On the same day, January 8, 1902, defendant in error filed an affidavit in the clerk's office in which he set forth that he had commenced an action against the plaintiff in error in the Common Pleas Court of Franklin County, Ohio, upon a promissory note executed by plaintiff in error to the deceased, Daniel Deiss, for the sum of \$500, with interest from 1875; that said claim was just, and said defendant in error ought to recover said amount and interest thereon from the year 1875; that plaintiff in error was a non-resident of Franklin county and state of Ohio; that affiant had good reason to believe, and he did believe, that Charles W. Haldy, administrator with the will annexed of the estate of Odo Orlopp, who died within said county of Franklin and state of Ohio, had property of the plaintiff in error in his possession liable to be attached in said action, consisting of money or other chattel property, and that the facts stated in said affidavit were true. Upon which affidavit the clerk of the common pleas court issued an order of attachment, and notice of garnishment to the said Charles W. Haldy, administrator.

On January 13, 1902, defendant in error filed an amended petition in the common pleas court. The amended petition set out a copy of the obligation averring that the paper writing was either a contract or promissory note, but the same paper writing referred to in the original petition. The

1904.]

Franklin County.

amended petition sets forth a copy of the paper writing, which is in words and figures as follows:

"I hereby certify to have received of Mr. Dan Deiss, as a loan for three months, \$500.

"EMILLIE ORLOPP,

"OSCAR ORLOPP.

"COLUMBUS, OHIO, August 12, 1872."

On January 9, 1902, order of attachment and garnishment was served upon Charles W. Haldy, administrator of the estate of Odo Orlopp, deceased, by handing him personally a certified copy of same. Publication of the proceedings was made as provided by law. On March 14, 1902, the plaintiff in error filed a motion asking that said attachment be discharged for the several reasons set forth in said motion, appearing for the purpose only of making said motion, and without any intention of entering his appearance for any other purpose, or submitting to the jurisdiction of said court over his person.

This motion was overruled, to which an exception was taken by plaintiff in error, to which action of the court, in overruling said motion, plaintiff prosecutes error to this court. A bill of exceptions was taken, bringing upon the record all of the testimony produced upon the hearing of said motion. The garnishee made answer in the case March 18, 1902, and it shows that there will be in his hands about the sum of \$1,500 coming to plaintiff on his legacy.

Whilst the motion sets forth several grounds and the same grounds in several different forms, there are but three insisted upon by plaintiff in error, in his brief. Counsel for plaintiff contends first, that the affidavit is insufficient in law to maintain an attachment because of the difference between the date of the instrument sued upon, as set forth in the original and amended petitions, and therefore a different date from which to compute interest; in other words, the attachment being issued upon the affidavit filed with the original petition setting forth a different date from that appearing in the amended petition, and a different date from which interest should be computed, the nature of the claim was not set forth in the affidavit. The statute requiring the nature of the claim

to be set forth in the affidavit is for the purpose of determining whether it is of such a character as entitles the party to an attachment. In an action upon a promissory note, a party may have an attachment if any of the statutory grounds upon which it may be issued exists.

The date of the instrument does not determine its character. The instrument set forth in the amended petition is substantially in form the same as referred to in the original petition. It is evidently the same debt, and in form and substance it is a joint and several promissory note, and upon which either a joint or several action may be maintained. The affidavit, therefore, we think good.

Second. Counsel for plaintiff in error contend that a legacy, the amount of which has not been fully determined by a final account of an executor or administrator, can not be attached. Under this contention he claims that no legacy can be attached and the executor or administrator garnisheed. In support of this claim he cites a number of authorities. We are of the opinion that under Section 5531, Revised Statutes, an undetermined legacy in the hands of an administrator or executor may be garnisheed; that administrators and executors are included under the designation of "other" officers in the above section. When referred to in a number of authorities they are designated as officers of court. We refer specially to the case of *Byers v. McAuley*, 149 U. S., 608, 615, quoting:

"An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is in the possession of the court."

Were it not for the section above referred to we would not be prepared to say that a legacy could be attached, especially if the amount of the legacy was undetermined. The answer of the garnishee shows that he will have, upon final settlement of the estate, about \$1,500 to be applied to the legacy of plaintiff in error. We hold it is subject to attachment, citing in support of this holding, *Stratton v. Ham*, 8 Ind., 84, 85, and also *Byers v. McAuley*, *supra*, from which we quote "all reme-

1904. [

Franklin County.

dies to which parties may be entitled against officers, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court they may pursue." The process given parties by Section 5531, Revised Statutes, does not withdraw the property from the custody of the officer or the jurisdiction of the court, or in any wise interfere with the proceedings of the probate court in the settlement of an estate, but is a remedy providing what a creditor may have to subject to the payment of a claim against a debtor who, upon a final settlement of an estate, may be entitled to receive money or property as a legacy. Upon the remaining question, that the court lost jurisdiction over the property because upon the answer of the garnishee it made no order as provided by Section 5550, Revised Statutes, we are of the opinion that the above section does not apply, where property is garnisheed in the hands of any one of the officers designated in Section 5531, Revised Statutes.

The service of process of garnishment upon an officer binds from date of service only such interest in the funds in his hands as may be determined as belonging to the debtor, by the court, under whose orders the officer holds such funds. The court issuing the order of attachment, has no power to order the funds taken from the custody of the court holding it. The order is limited to the amount that may be found coming to the legatee on distribution upon final settlement of the estate. Such order binds only such interest in the funds as may ultimately be found belonging to the debtor. The money being already in the custody of an officer who has given bond, the undertaking required by Section 5550, Revised Statutes, has no application.

The court issuing the order of attachment is without authority to require any part of the property or money, held by an officer under process of the court whose officer he is, paid into court issuing the order of attachment until a final adjudication by the court having custody of the funds. No bond could be required of such officer because the extent of the debtor's interest can not be known until a final adjudication by the court having custody of the funds. The court below acquired no

jurisdiction over the person of the plaintiff, but did acquire jurisdiction over a thing and did not lose it. We find no error of record prejudicial to plaintiff in error and the judgment is affirmed at costs of plaintiff in error.

A. H. Johnson and Henry Elliston, for plaintiff in error.

Gumble & Gumble, for defendant in error.

THE POWER TO MORTGAGE AND THE POWER TO SELL.

[Circuit Court of Lucas County.]

THE SECURITY TRUST CO. v. THE MERCHANTS & CLERKS' SAVINGS BANK CO. ET AL.

Decided, June 11, 1904.

Securities Placed in Trust—For the Support and Education of Children—Right to Sell Includes the Right to Mortgage—Trustees and Trust Estates—Guardians.

K placed certain stock in trust for the support and education of his children, with the proviso that if the income therefrom should be insufficient the trustee should have the power to convert a few shares from time to time into money for the purposes designated in the trust.

Held: That the power to sell included in this case the power to mortgage, and that it was incompetent, in a suit for recovery of the pledged stock from the bank making the loan, to introduce testimony tending to show that the contingency provided for under the trust had arisen, and that the bank acted prudently and in good faith and without collusion in making the loan, and that the trustee used his own good judgment honestly and fairly to meet the expenses of educating the children; and these facts having been established, a succeeding trustee can not recover the security from the bank except by tendering the amount due on the note.

HAYNES, J.; HULL, J., and PARKER, J., concur.

This case comes into this court by appeal, and has been heard upon the evidence. The case presents some questions of importance, although the amount in controversy is not very

1904.]

Lucas County.

large. It has been very fully and ably urged by counsel on either side, and a very large number of authorities cited. In the opinion which we shall deliver in the case we shall be very brief in disposing of the questions, not attempting to discuss all questions raised in the case, but briefly to announce our conclusions.

It appears that about the year 1892 George Dennison Keeler, a resident of this city, had been divorced from his wife. He had three children, two boys and one girl. The possession and custody of the girl had been delivered to the mother; the boys seemed to have fallen to the lot of the father. George D. Keeler was the son of Salmon H. Keeler, who had long resided in this county, and upon whose death a considerable estate had fallen to his children, George D. Keeler being entitled to and possessing his share. His financial circumstances, however, became such that he seems to have had some little doubt about his future, financially, and he on the 12th of May, 1892, executed a deed of trust to his brother, Arthur B. Keeler. George was possessed at that time of 150 shares of \$100 each of stock of the Holcomb National Bank of the city of Toledo, and these he transferred to his brother in trust for the benefit of his three children, according to the terms of the instrument, which was quite lengthy and quite elaborate and full, 50 shares to be held for each child. It provided that the shares should be held until the youngest child became of age, and that the income of them should be applied for the education and support of the children, if necessary. So long as the daughter resided with the mother, the whole income went to the support of the two boys. It provides that the stock should not be sold, except under certain circumstances. The whole scope and purpose of the trust was to set aside this property to the children, and preserve it as far as possible for them until the youngest should become of age. Among other things it provided:

“Should my own financial circumstances be such as to prevent me from furnishing any maintenance or support or education to my children before they become twenty-one years of age, or the income or dividends from said stock fail to give to my sons the necessary support and education, then and in such

case said trustee is hereby authorized and directed to convert a few shares of the quantity belonging to each of said *cestui que trust* into money from time to time, to obtain the necessary means to furnish to each necessary support or education."

It is claimed on behalf of the trustee that from that time forth the father failed to pay anything towards the support and maintenance of the children, and it would seem from the testimony here that his financial condition was gradually growing worse.

It appears by the evidence that at the time this trust deed was executed, and just prior thereto, the former guardian of the children resigned, and Arthur B. Keeler was appointed the guardian of the person of the three children, so that he stood in the dual capacity as guardian of the persons of the three children, and as a trustee, holding this property for their benefit; and it should be noted that by the statutes governing the guardianship of the person of children, that the guardian of the person is to see to the education of the children, their care, and that he is authorized by law to draw upon the person who is the guardian of the estate of the children for the necessary moneys for their education and support. We may remark in passing that the guardian of the state would stand in relation to these parties substantially as would the guardian of the person, of course being affected simply by the limitations of the trust.

Matters had run along, and the guardian had been receiving dividends whenever they were made on this property, and attending to the education of the children, some of them being sent away to school, and some of them in other places. In the course of time, it seems that George D. failing to provide money, and the children having to be supported and maintained, it became necessary for the trustee to borrow money, and he did obtain from the administrator of the estate of his father, Salmon Keeler, \$600, which it is stated in the testimony was used for the support and maintenance of these children, and their education. But the time came when that money was becoming due, and thereupon he went to the defendant savings bank, and desiring to borrow \$600 of that bank, negotiations were opened for the purpose of seeing whether the bank would loan him the

1904.]

Lucas County.

money. He proposed to secure a loan of \$600 by the transfer of \$1,000—that is, ten shares—of the capital stock of the Holcomb bank which he held in trust, and the bank officers made inquiry with respect to the matter, and investigated, it seemed, quite fully into the circumstances and the needs of the trustee with regard to the moneys that he required. The administrator of the estate of Salmon Keeler appeared before them to make a statement with regard to the moneys that had been loaned, and a statement was made with regard to the use that had been made of that money, to-wit, for the support and maintenance and education of the children. The bank, desiring to be perfectly sure about the position they were taking, requested that he apply to the probate judge who had appointed him guardian, and get his consent or an order that he might make this loan. He went to the probate court, and the probate court appointing him, granted him permission to pledge this stock. While perhaps it may be doubted whether without that order it would not have been legal and binding, yet the circumstance goes to show the care which was exercised by the bank in the negotiation of this loan, in endeavoring to ascertain their rights in taking the stock for security. Thereupon the loan was effected and the stock was pledged, and such of the money as was needed to take up the note to the administrator of the estate of Salmon H. Keeler was paid over to him. The balance was paid to the trustee for his use, and was used for the children.

Subsequently Arthur Keeler moved to California, and certain parties who were interested in the children took steps to have him removed as trustee of this fund, and he was by order of the court of common pleas removed from the position, and the Security Trust Co. was appointed in his place. Thereupon the Security Trust Co. demanded of the Merchants' & Clerks' Savings Bank that they should turn over to it these ten shares of stock which they held. The note which they were pledged to secure had not been paid. A little interest had been paid, but the face of the note and some arrears of interest were still due. The Security Co. made no tender of the amount due on the note, nor did it make any offer to pay it. It assumed that the bank had no right whatever to this stock; that its title was wholly

void, and that the Security Trust Co. was entitled to the immediate possession of the property.

Upon this proposition have been cited the decisions that I have referred to. It is claimed upon the one hand that under this clause in the deed of trust which authorized the selling of the property under certain circumstances, the trustee could only sell and receive the amount of money for which he could sell the property. On the other hand, it is claimed by the bank that the right to sell included also, under proper circumstances, the right to mortgage.

Testimony was offered tending to prove that at the time the loan was made the stock of the bank, owing to the fact that it had passed dividends for two years, was below par, or at least not above par, and that it was rather under a cloud as a marketable article; that it was better for the bank and considered better for the trust and trustee that the stock should be kept in shape where it would have the benefit of any rise in the market price thereof. The testimony shows that there has been an increase in the earnings of the bank since that time, and an increase in the value of the stock and its salability. It is claimed by the bank that these matters were taken into consideration at the time the money was borrowed.

It is claimed that even if there was a right to mortgage the property, the officers of the bank were bound to know that circumstances had arisen that would authorize the trustee to pledge it; they were bound to ascertain and know, if we understand the argument, that George D. Keeler was neither furnishing anything for the support and education of his children, nor had he the means to do it. It will be observed, that contingency arising, the trustee would have the right to sell this property, or so much of it as would be necessary, from time to time, from each one's share, to support that particular child. If the trustee could make no sale of the property except that the person who purchased it must ascertain and know, and be able to maintain in court at any and all times that the contingencies had arisen under which a sale could be made, he would not be very likely to make a sale of the property. No person who wanted to buy the property would take upon himself an offer of that

kind, and be able to come into court and show that the trustee had the right to sell. So the mortgagee, if there was a right to mortgage, would stand in the same position.

I have said that a large array of authorities have been cited upon the propositions respectively urged by the parties to this suit. It is sufficient to say, and all I deem necessary to say at this time, that there are a large number of authorities, very able courts, that hold that the power to sell does not include the power to mortgage, and that the powers that are stated in the deed of trust with which the trustee is qualified must be strictly followed and pursued. There are a large number of authorities of very able courts who hold that the power to sell does include the power to mortgage, some of the ablest courts in the United States saying that it does, beyond all question. We are inclined to hold, and we do hold, so far as this case is concerned, that this trustee had the power, the contingency arising, to borrow money for the support and maintenance of these children, and to pledge this stock for such a loan. It is proper to offer testimony here showing that the bank acted prudently and in good faith in regard to the matter, and that under the conviction that the trustee was acting honestly in the purpose in which he was acting, in borrowing the money, and that there was no collusion on its part with him in loaning it for any other purpose than that for which it was stated. We think, so far as we are concerned, that this is the justice and equity of a matter of this kind, and we are inclined to follow those decisions that hold the law to be as stated, in that respect. In those cases it has been held by the courts that testimony of the kind that I speak of is admissible. The testimony in this case we think shows that this money was borrowed for this purpose, was used for this purpose. The fact that it was used to pay a debt that existed for money that had been already borrowed and used for this purpose is matter that would make no difference in the case, in our judgment.

It is claimed that there were some moneys in the bank that should have been appropriated to this purpose; but this trust was a continuing trust. If that money had been used for this purpose, the trustee would have had to raise money for the

purpose of paying expenses. It was simply a matter in which the trustee was using his own good judgment honestly and fairly to meet the expenses of the education of the children—expenses already incurred and expenses to be incurred. It was claimed that George D. Keeler had some property still in his possession, but here was the trustee chargeable with the care and support and maintenance of the children, and the father was furnishing him no money, and he could not sit down and wait until some interest was worked out of the father's estate, if George had anything left. It appears that his creditors were all after him, and were attaching properties that were supposed to belong to him, and that he was in financial difficulties, and going through his property rapidly. The testimony tended to show that he could act, might act, and should act, for the purpose of that he was out of money, had no means, was practically poor. The fact is, under the circumstances of the case, that the trustee was raising money for the support and maintenance of these children; that the contingency had arisen which had been contemplated in the deed of trust itself for furnishing this money for the support of these children.

After stating our conclusion in regard to the matter, we hold that the action of the Security Trust Co. can not be maintained, and the Trust Co. as trustee of this property or any of it has no right to take this security from these parties, save and except by tendering the amount that is due upon the note. We think it would be unjust and inequitable that this trustee should be permitted to take from this bank these securities without tendering to it the money that is due upon the note.

The action, therefore, will be dismissed.

Johnson Thurston, for plaintiff.

O. B. Snider, for defendant.

LIABILITY OF A CO-ADMINISTRATOR.

[Circuit Court of Hamilton County.]

FRANK J. DORGER v. J. O. WOODWARD, ADMINISTRATOR, ET AL.

Decided, August 3, 1904.

Administrators—Indebtedness of one of Two Administrators to the Estate—Constitutes Assets in the Hands of Both—And Both are Principals Under Their Joint Bond.

An indebtedness to the estate of a decedent from one of two administrators will be considered as having come into the joint possession of both, and as between themselves and the surety on their joint bond they are both principals.

SWING, J.; GIFFEN, J., and JELKE, J., concur.

H. J. Cordesman and Frank J. Dorger were appointed administrators of the estate of Maria F. Cordesman, and gave a joint bond with the American Bonding & Trust Company as surety. At the time of the appointment H. J. Cordesman was indebted to the estate in the sum of \$2,000, evidenced by a note to M. F. Cordesman. It is claimed in this action that at the time of the giving of the bond said Cordesman was insolvent and has remained so up to the present time. Under the law as announced in the first proposition of the syllabus in the case of *McGaughey, Admr, etc., v. Jacoby et al*, 54 O. S., 487, the amount owing by said Cordesman became assets in the hands of the administrator for which the surety on his bond is liable.

There being no question but what the amount due by said Cordesman is assets in his hands and for which the surety on the bond is liable the question here is whether in the first instance the joint administrator, Dorger, or the surety company is liable. Dorger had knowledge of this indebtedness at the time of the appointment and had the note in his possession.

An inventory was returned by said administrators to the probate court in which said note was mentioned but was not returned as assets in their hands.

Under these facts we think this asset must be considered as having come into their joint possession, and under the case of *Eckert v. Myers*, 45 O. S., 525, as between themselves and the surety are principals.

Some time afterwards said administrators gave separate bonds, but this in no way changed the liability of the parties which accrued while the first bond was in force. Besides it seems to us that the bonds given separately were not substitutes for the first bond, but additional bonds.

Judgment was rendered in this case in the court of common pleas for the full amount due on this obligation. As H. J. Cordesman was an heir of Maria F. Cordesman, and there being no debts of the estate and as such heir he would be entitled to a certain portion on distribution, it would seem unnecessary to pay into court the amount which would be immediately payable to him as heir on distribution. The amount due him as heir should be a credit on the amount due from him as administrator.

The judgment should be modified to this extent.

John C. Healy, for plaintiff in error.

Horstman & Horstman, for defendant in error.

1904.]

Richland County.

**EXPULSION OF A TRESPASSER FROM A MOVING FREIGHT
TRAIN TO HIS INJURY.**

[Circuit Court of Richland County.]

EDWARD WHISTLER V. JOHN K. COWAN ET AL, RECEIVERS.*

Decided, January Term, 1903.

Master and Servant—Liability for Act of Servant—And of Railroad Company for Expulsion of Trespasser by Employee, When—What Must be Shown—Where the Expulsion was by Brakeman on a Freight Train—Authority Not Implied—And Proof that He was a Brakeman not Sufficient to Hold the Company—Agent or Employee of Adverse Party Can Not be Called for Purpose of Cross-Examination, When.

1. A master is not responsible for the wrongful act of his servant unless the act be done in the execution of authority, express or implied, given by the master.
2. A railroad company is liable for the willful wrong of its employee in expelling a trespasser from its freight train while in motion to his injury only upon proof that the act was done by such employee in the course of his employment and within the scope of his authority.
3. In order to hold a railroad company responsible for an injury resulting to a trespasser upon one of its trains when there is no contractual relationship between the parties, and the injury results from an order to get off the train by an employee other than the conductor, or the person in charge of the train, the party injured must establish one of two propositions: Either that there was direct authority given the employee to order such person off the train, or from the employment or position occupied by such employee giving the order that duty arises by implication of law.
4. Where a regular freight train is in charge of a regular crew consisting of a conductor, engineer, fireman and necessary brakeman, in the absence of evidence showing by course of conduct, custom or instructions, that a brakeman thereof had authority to keep trespassers therefrom, such authority would not arise by implication simply from the fact that he was a brakeman.
5. If a brakeman expels a trespasser from such a train while in motion, and the party expelled is injured thereby, proof of the fact that he was such brakeman is not alone sufficient to hold the company liable.

*Affirmed by Supreme Court without report, June 30, 1904.

6. It is not error to refuse to permit one party to a suit to call the agent or employe of the adverse party for the purpose of cross-examination before such person had been offered as a witness by the adverse party. Section 5243, Revised Statutes, does not apply to an agent or employe of the adverse party.

Error to the Court of Common Pleas of Richland County.

Edward T. Whistler, plaintiff in error, filed his petition in the Court of Common Pleas of Richland County, Ohio, against John K. Cowan et al, Receivers of the Baltimore & Ohio Railroad Co., in which it is alleged that he, on or about the 18th day of April, 1898, boarded a freight train of the defendants' company at Lexington, Ohio, that was bound for Mansfield, Ohio, and other points north on said defendants' road, which said train was being conducted over said road by the agents of said defendants; that after said train had left Lexington, so situated on said road, and on which plaintiff was then riding, and after said train had attained a high rate of speed, to-wit, fifteen or twenty miles an hour, one of the employes on said train, an agent of defendants, a part of whose duty it was to keep unauthorized persons off of said train, without any provocation, other than that plaintiff was riding on said train, he, the said employe, in a menacing manner, with club in hand, approached plaintiff and ordered him to get off of said train. That plaintiff offered to comply with the demand of said employe on said train, whom he believed to be a brakeman, and who was a brakeman on said train, provided he would slow up the train or stop the same; that immediately after so communicating his intention to comply and act to said brakeman, he was again, in a most insolent, threatening and demonstrative manner ordered to leave said train instantler by said brakeman, who made no effort to slack the train, and thereupon said brakeman, in a most menacing and threatening manner, approached plaintiff and compelled him against his will to leap from said train while it was in motion and while at said great rate of speed. The petition sets forth the injuries caused thereby to the plaintiff, and asks to recover his damages, which are stated at \$15,000.

Defendants' answer, for a first ground of defense is a general denial, and for a second ground say that plaintiff was well

1904.]

Richland County.

acquainted with the movement of trains and the tracks and premises where he was injured, and on said 18th day of April, 1898, without necessity, excuse or promises therefor, went upon said defendants' railroad train, and by his own negligence and want of ordinary care directly contributed to said injury.

Plaintiff's reply to this second defense was a general denial.

On the trial to a jury, at the close of the plaintiff's testimony, the court, on motion of the defendants, instructed the jury to render a verdict for the defendants, which was done. A motion for a new trial was overruled, exceptions taken, and judgment rendered on the verdict. A bill of exceptions containing all the evidence was taken and made a part of the record. Error is prosecuted to this court to reverse the judgment of the court below.

VOORHEES, J.; DOUGLASS, J., and DONAHUE, J., concur.

The question is, did the trial court err in directing a verdict for the defendant on the evidence produced by the plaintiff?

Without restating the allegations of the petition it will be observed that the plaintiff does not allege therein, or contend in his evidence, that he was a passenger upon this train; but it does appear from the evidence, that on the occasion of the injury he was wrongfully on the train as a trespasser. It is contended that, notwithstanding he was a trespasser on the train, if an agent of defendants' company or an employe on said train, a part of whose duty it was to keep trespassers and unauthorized persons off of the train, did, in a threatening and menacing manner, when the train was running at a speed of fifteen or twenty miles an hour, order plaintiff off of the same, and in obedience to such order, under the circumstances stated, plaintiff in getting off was injured, the company would be liable.

The answer of defendants puts in issue the allegation of the petition that the employe on this train was authorized or had any authority or control of the train in its operation, or in keeping persons off who had no right to be thereon.

The right of the plaintiff to recover in this action turns upon this question: Whether the person who ordered plaintiff off of the train was, at the time in the discharge of his duty, acting within the scope of his employment.

The petition does not allege who this employe was, does not describe his employment, except in one place the plaintiff says that he was an employe and an agent of the company, a part of whose duty it was to keep unauthorized persons off of said train; and in another place he alleges that "he believed said employe to be a brakeman, and who was a brakeman on said train." The evidence in the record upon this particular question the same act done by a servant falling within the other class, it is about as uncertain as the petition. The plaintiff in his testimony, in referring to the person who ordered him off the train, says, "he was a brakeman." There is no other evidence that this person who ordered him off the train was in fact a brakeman. Testing the question we will assume that the person who did order plaintiff off the train was a brakeman on that particular train. It was a regular freight train. Such a train must have more than one brakeman in charge of it. A regular crew may be assumed to have had charge of the train on this occasion, which would consist of a conductor, engineer, fireman, and the necessary brakeman. It was a train that did not carry passengers. It is conceded that the plaintiff was on this train wrongfully, not only in violation of the statutes of Ohio, but without authority from any one in charge of the train. In other words, he was a trespasser. From the evidence it appears that he and his companion, Bert Gray, got on the train after it had left the station at Lexington. After leaving this station and proceeding in its course toward Mansfield, this person, who plaintiff designates as the brakeman, saw plaintiff and his companion, Gray, on the train, and ordered them off.

Without going fully into the details as to what occurred between the brakeman and these parties, it is sufficient to say, that from the record it appears that the plaintiff claims that the brakeman with a weapon in his hand and in a menacing manner advanced toward him and ordered him to get off; that if he did not do so, he would knock him off; and, in obedience to these orders and threatening manner, he undertook to get off the car he was on by going down the ladder; being a box car he was on top of it. On reaching the lower round or step

1904.]

Richland County.

of the ladder he jumped off, his foot went under the car and he lost his foot and ankle.

It is not shown by any evidence in the record that the brakeman had any authority to put persons off of the train. It is alleged in the petition that he was so authorized. That is denied by the answer. The record fails to show that he had any authority in this regard. The record does not undertake to disclose what authority this brakeman had, whether he had charge of any portion of the train, or what his duties were as brakeman.

The question resolves itself in its legal aspect into this: Is a railroad company liable for the act of its employe, a brakeman, in expelling a trespasser from one of its freight trains, while in motion, to his injury?

The company is liable when the act is done by such employe in the course of his employment, and the act complained of is within the scope of his authority; otherwise not.

In order to hold the railroad company responsible for an injury resulting to a trespasser from the wrongful act of an employe, as in this case, the party injured must establish one of two propositions: Either that there was direct authority given the employe to order the person off of the train, or that, from the employment itself or position occupied by the employe, the duty arises by implication of law. It is not contended here that there was any direct authority given to this brakeman to do anything with reference to trespassers upon the train. There is nothing in the record showing or tending to show by any course of conduct, custom or instructions, that a brakeman was so authorized or required to act as a part of his employment. Does this duty or authority arise by implication simply from the fact that he is a brakeman? If it does so arise, then it would have been the duty of the company to show in this case that what this brakeman did was outside of his implied duty or authority.

In the case of a trespasser no duty except abstinence from wanton injury and gross negligence lies upon the carrier to make the carrier or master liable. The wrong done by the servant or employe must be an act within the scope of his duty

and in the course of his employment. Wood on Railroads, Volume 2, Section 316, page 12, states the principle thus:

“While in the case of passengers, because of the contractual duty existing on the part of the company, the question as to whether the servant committing the injury had authority, express or implied, to do so, or in other words, whether it was done in the line of his duty, is not material, yet when the question arises between a trespasser, or one to whom this duty is not owed, and the company, a different question is presented, and the company can only be made liable when authority, express or implied, to do the act is shown. Thus the conductor of a train, being in charge of and having full control over it, represents the company as to any matter connected with its management or control, and for an act done by him in the line of his duty, as by the ejection of a trespasser, the company would unquestionably be liable: but for the act of a brakeman of the train, who, without the direction of the conductor, should remove a trespasser from the train, the company would not be liable, unless express authority to do an act to which the act complained of is incident, is shown, because the act is not one which comes within the scope of his duty.”

In Elliott on Railroads, Volume 3, Section 1255, the author says:

“A railroad company owes trespassers no contractual duty; indeed, as already stated, the general rule is that it owes them no duty, except not to willfully injure them, and this rule applies to those who are attempting to steal a ride, or otherwise trespass upon the company's cars. They are not in a position to invoke the doctrine of apparent authority, and can only hold the company liable for acts of its employees done within the scope of their actual authority, express or implied.”

Outside of the exception as to passengers, the employees of a railroad company may be divided into two classes: for the willful wrongs of one class, though done to even a trespasser, the company is liable, because the act is done in course of their employment and within the scope of their authority; while for the same act done by a servant falling within the other class would not be liable. A company may be held liable for a trespass by a conductor of a freight train to a trespasser on his

1904.]

Richland County.

train, as in the case of *Railway Co. v. Boyer*, 18 Cir. Ct. (Ohio), page 327, but not for the same act of and by a brakeman on the same train.

These principles we consider to be supported by the following additional authorities: *Railway Co. v. Wetmore*, 19 O. S., 110; *Stranaham Bros. Co. v. Coit*, 55 O. S., 398; *Nelson, etc., Co. v. Lloyd*, 60 O. S., 448; *Planz v. Railroad Co.*, 157 Mass., 377; *International, etc., Ry. Co. v. Anderson*, 82 Texas, 516; 27 Am. St., 902; *Marion v. Railway Co.*, 59 Iowa, 428; 13 N. W., 415; *Towanda Coal Co. v. Heeman*, 86 Pa. St., 418; *Bess v. Railway Co.*, 35 W. Va., 492; 29 Am. St., 820; *O'Neill v. Railway Co.*, 2 Cir. Ct. (Ohio), 504, 510.

There is nothing in the record, applying even the scintilla rule, tending to show that the act of this brakeman was an act done within the scope of his duty as such brakeman or employe of said defendants' company. In the absence of such authority and duty he would stand to the company just as a stranger would. If a stranger had ordered plaintiff off the car, as did this brakeman, the railroad company would not be liable. The railroad company can only be liable to trespassers for the act of a servant when the act done is ordered by the master or is the result from necessary implication from the employment. There is no evidence in the record tending to establish either of these facts or conditions of liability. Therefore the court of common pleas did not err in directing a verdict for the defendants.

There is one other ground of error which will be briefly considered. It is contended that the court erred in refusing to permit the plaintiff in error to call the engineer of this train for cross-examination. The court refused to permit the engineer to be called for cross-examination because he had not been offered as a witness by the company. The court informed plaintiff if he desired to put the engineer on the stand, that he could do so, but he would make him his own witness, and not merely for cross-examination under the statute. This plaintiff was unwilling to do. Under the circumstances the court did not err in refusing to permit plaintiff to cross-examine the engineer.

The court was justified in taking the case from the jury for the reasons stated, and the judgment of the court is affirmed, with costs.

Douglass & Mengert and *Vivan Abernethy*, for plaintiff in error.

Cummings, McBride & Wolfe, for defendants in error.

THE MODIFYING OF JUDGMENTS.

[Circuit Court of Summit County.]

THE CITY OF AKRON v. THE CLEVELAND TERMINAL & VALLEY RAILROAD COMPANY.

Decided, April 15, 1904.

Jurisdiction on Error—To Modify or Reverse a Judgment—Can Only be Done on the Pleadings or the Facts—Record Silent as to the Facts.

A reviewing court is without authority to render a different judgment from the one rendered below, except upon the state of the pleadings, or a finding of fact, or a bill of exceptions containing the facts upon which such different judgment can be based; and where the record merely shows that the case was heard, and was argued by counsel and judgment rendered, there can be no modification or reversal of such judgment.

HALE, J.; MARVIN, J., and MCCARTY, J., (sitting in place of Winch, J.), concur.

This case comes into this court by proceedings in error.

On the 30th day of October, 1902, the city instituted proceedings in the probate court of this county for the assessment of the compensation and damages by reason of the appropriation of property belonging to the defendant railroad company, and others, to the use of the city.

After many delays, on August 4, 1903, the preliminary questions involved in the necessity and the right of the city to appropriate were heard by the probate court, and upon that hearing, for some reason, the court determined to consider the questions involved as against all other owners of property separ-

1904.]

Summit County.

ate from and independent of the railroad company. As to all property owners, except the railroad company, the court found all jurisdictional facts involved in that hearing with the city, and that it was entitled to appropriate the property, and that a jury should be impaneled to assess the compensation and damages to the owners of the property; and there, as to all owners of property, except the railroad company, the record stops. On the same day this entry was made on the issues made between the railroad company and the city:

“This cause coming on further to be heard on the application filed herein by the city of Akron to appropriate and condemn the lands described therein against the defendants therein named, and the amended answer to said application filed herein by the Cleveland Terminal & Valley Railroad Company (each and all the other defendants having failed to plead herein, and having failed to appear and contest the right of said city to appropriate said lands described in said application), the city of Akron and the Cleveland Terminal & Valley Railway Company introduced their evidence and the cause was argued by counsel and submitted to the court. It is therefore considered and adjudged by the court that the application of said city of Akron to appropriate said lands of said the Cleveland Terminal & Valley Railroad Company be and the same hereby is dismissed at its costs, but without prejudice to its right to commence a new proceeding for the appropriation of the property of said railroad company and the appropriation of the property of any or all of the other defendants herein named, for the extension of said Prune street.”

To all of which finding and judgment of the court exceptions were taken. A petition in error was filed in the court of common pleas to reverse so much of this judgment as added to the judgment of the court “without prejudice to its right to commence a new proceeding,” but leaving the balance of the judgment stand.

The court of common pleas reversed that part of the judgment, leaving it to stand as an absolute dismissal of the case, without the modification “without prejudice,” and the correctness of the ruling of the court of common pleas is now before this court for review.

No bill of exceptions was taken on the hearing of this issue before the probate court; there was no finding of fact by that court; and we are wholly ignorant of the facts upon which that judgment of the probate court was based. What we do know is, that after the evidence had been introduced, the court dismissed the proceedings without prejudice. Why, we do not know.

It is clear that this judgment, as a whole, can not be reversed upon this record. Indeed, there is no claim that it can be. No such claim was made in the court of common pleas. That court was only asked, in effect, to modify the judgment. We are satisfied that that judgment must stand as rendered, or the whole judgment set aside; and as it is not asked to set aside the whole judgment, it necessarily follows that it must stand as rendered. The judgment is an entirety. The dismissal of the proceeding, without prejudice, has an entirely different legal effect from the dismissal of a case with prejudice, or without that qualification. The probate court never rendered the latter judgment. That court adjudged that the proceeding should be dismissed without prejudice, but never held that, under the facts, the case should be dismissed without that qualification. To strike out that qualification leaves a judgment that that court never rendered; and there are no facts upon this record from which this court, or the court of common pleas, could determine that that court intended to render such judgment, or that such judgment was the proper judgment to be rendered.

We are aware that a reviewing court, on the reversal of a judgment under proper conditions, may render such judgment as the trial court should have rendered in the case; but that must be done either upon the state of the pleadings, or upon a finding of fact, or upon facts brought before the court in a bill of exceptions, so the court can have before it the facts upon which to base such judgment. There were no such facts in this case. There was no finding of fact at all by the trial court. All we know is, that the case was heard, argued by counsel and judgment rendered, dismissing the case without prejudice.

1904.]

Cuyahoga County.

Whether some technicality arose, or for what reason that was done, does not appear.

So we hold, as this record stands, no reversal or modification of that part of the judgment was authorized by the court of common pleas.

We, therefore, hold the court erred in modifying the judgment of the probate court, and the judgment of the court of common pleas is reversed, and that of the probate court affirmed.

C. F. Beery, for plaintiff.

Allen, Waters & Andress, for railroad company.

EVIDENCE AS TO LOST DEED.

[Circuit Court of Cuyahoga County.]

MATILDA SLIPMAN V. CHARLES TELSCHOW ET AL.

Decided, February 23, 1903.

Lost Instruments—Evidence Necessary to Establish Execution of.

Under the rule of the Supreme Court as to the evidence necessary to establish a deed alleged to have been lost, it is not sufficient to show that an order was left with a certain abstract company for the drawing of such a deed, or that such a person saw a deed supposed to cover the property in the suit, but who did not observe as to whether it was properly witnessed and executed.

MARVIN, J.; HALE, J., and WINCH, J., concur.

This case comes into this court by appeal from the judgment of the court of common pleas.

The petition sets out that the plaintiff is the owner of a certain piece of real estate in this city, and describes the same, with the averment that the defendants claim some interest therein, and the prayer is that her title to said land may be quieted.

To this petition the defendant, Charles Telschow, answers, denying that the plaintiff is the owner of the whole of said real estate, but avers that he is the owner of an undivided one-half thereof.

The defendant, Wilhelmina Telschow, answers that she is the wife of the defendant, Charles Telschow, and as such has an interest in said estate to the extent of her inchoate right to dower in an undivided one-half interest, which she says is owned by the said Charles.

Whatever rights the plaintiff has in this property came to her by descent from her former husband, Fred Slipman, who died intestate and without issue in July, 1898. In 1892 the property in question was purchased jointly by the said Fred Slipman and the defendant, Charles Telschow, and a deed of the same was executed and delivered to them for the property.

There is no dispute here that the plaintiff is the only heir of her deceased husband, and as such is the owner of an undivided one-half of these premises. The whole dispute is as to the remaining one-half. The claim on the part of the plaintiff is that in 1894, on June 7, a warranty deed of this undivided one-half, which theretofore was the property of the defendant, Charles Telschow, was executed by the said Charles and his wife, Wilhelmina, and delivered to the said Fred Slipman. This deed was not recorded and is not produced in court. Its absence is explained by the plaintiff by saying that immediately after its delivery to her husband he brought it to their home and exhibited it to her; that she complained that her name nowhere appeared in the deed; that her husband became angry and tore the deed, if not entirely into two parts, very nearly so, and then left the room; that she with court plaster fastened the two parts together, went to the room of her mother, which was in the same house, and there exhibited it to her mother, Mrs. Blaha, her sister, Emma Koss, and her brother, John Blaha; that they made some examination of it, but such examination was very hasty, as she heard her husband come into the hallway adjoining the room in which she was exhibiting the deed, and she folded the deed, put it into her clothing and thereafter placed it in a drawer in the room where she and her husband lived. She says that two or three years thereafter her husband took the deed from this drawer and said that he placed it in the safe of the defendant, Charles Telschow, and that she has never seen it since. At the time when she says this deed was delivered to

1904.]

Cuyahoga County.

her husband the relations between herself and her husband were strained, and some two years thereafter she brought a suit for divorce against him and went to live with the defendants, the defendant, Wilhelmina Telschow, being his mother, and it is at or about the time of this separation that she says the deed was taken from their home. After a separation of about five months she and her husband went to living together, and so continued up to the time of his death. Both of the defendants emphatically and unqualifiedly deny that any deed from them to Fred Slipman was ever executed by them. They deny that they ever signed any such deed.

On the part of the plaintiff one Harry Van Heining was called as a witness. He testified that in June, 1894, he was in the employ of Cozad, Belz & Bates Abstract Company of the city of Cleveland; that he was at the time a notary public; that a part of the business of said company was the drawing and acknowledgment of deeds; that by a custom of the company, when a deed was to be drawn, if the deed to the parties about to make the new deed was brought into the office of this company a minute or memorandum was made on such deed, indicating the parties to the new deed and the consideration to be expressed in said new deed, and that a number was given to the transaction, which number was minuted on the old deed; that then in a minute book kept by the company an entry was made with a corresponding number, which entry indicated what was to be done with the deed on which this number was written, and then a mark was made upon such memorandum indicating when the transaction, so far as their office was concerned, was completed. The plaintiff then offered in evidence the deed made to Telschow and Slipman in 1892, and this being exhibited to the witness, he stated that a number, to-wit, 45,115, which appears in pencil on the filing side of said deed, was made by him; that this indicated that some memoranda in reference to this deed would be found in the books of the company under a corresponding number. He further testified that a memorandum found on the opposite side of this deed when folded, reading, "Charles and Wilhelmina Telschow to Fred Slipman, \$580," was made by him. He then produced a mem-

orandum book, or a book of the abstract company, entitled on the back, "Orders," and exhibited to the court under the number 45,115 a memorandum which reads: "45,115. Ordered by Chas. T., draw D. Charles and Wilhelmina Telschow to Fred Slipman, for \$580 for an undivided one-half interest. To be done Friday, 11 A. M. Delivered 6—8—94." He says that he has no recollection whatever of making the memorandum on the deed nor of making the memorandum in the book. He says that certain marks drawn with a blue pencil across the memorandum in the book indicate the completion of the transaction.

The defendants objected to the introduction of the memorandum on the deed and also the memorandum in the book, and the same was received by the court over such objection, the court reserving, however, the question of whether it should be treated as evidence in the case. The conclusion to which the court has arrived makes it immaterial whether this evidence be considered or not, and hence the question is not here decided. All that is indicated by these memoranda may be true to the extent of showing that this old deed was taken to the abstract office by somebody; that a deed of the undivided one-half from Charles and Wilhelmina Telschow to Fred Slipman was ordered and was made out and paid for. It does not necessarily follow that such deed was ever signed or even ordered by Charles or Wilhelmina Telschow or either of them, and if it was so signed by either of them, it does not follow that the same was ever properly executed. The evidence as to the execution is that the plaintiff says she saw the names of the defendants on the deed shown her by her husband at the proper place for them to sign if they were making such deed. She says there were some names on the left-hand side of the deed nearly opposite these names of the defendants, at the place where witnesses would sign if the deeds were properly executed, and she says there was some kind of a seal on the lower left-hand corner of the deed shown her. She says, too, that this deed shown to her was a warranty deed, and that it described the undivided one-half of the property described in the petition. She does not know whether there was the name of any

1904.]

Cuyahoga County.

notary signed to the acknowledgment or not, nor does she know whether the names of the defendants were written by them or somebody else, nor does she know whose names appeared at the proper place for witness to sign. Her mother, Mrs. Blaha, remembers less of the deed than does the plaintiff. John Blaha, her brother, remembers practically what she does about its appearance. Her sister, Emma Koss, was somewhat familiar with the execution of deeds, being employed in a business office where deeds are frequently made out. She is not certain about the description, but says that the names of the grantors appeared at the proper place for grantors to sign. There were names written at the place where witnesses should sign, and the certificate of the acknowledgment was filled out and it seemed to be all right. She has no recollection of who the witnesses were, nor does she remember that the names of any officer or person was written at the place where the officer taking the acknowledgment should write his name.

There is evidence tending to show that since the death of Fred Slipman the rents upon all this property have been paid to the plaintiff. But she is the administratrix of the estate of her deceased husband; these parties have been in litigation about this property almost ever since Fred Slipman's death, so that the inference is not very strong that this was a recognition on the part of the defendants of her ownership of the property.

Evidence was offered on the part of the defendants tending to show that during the lifetime of Fred Slipman semi-annual settlements were made between him and the defendant, Charles Telschow, in reference to this property, but none of this testimony is very important as bearing upon the issue here. Certainly the case of the plaintiff must be determined upon the question of whether the writing which her husband exhibited to her in June, 1894, was a deed duly executed, attested and acknowledged by Charles and Wilhelmina Telschow to Fred Slipman for this undivided one-half of the property. If all that the plaintiff says is true, though she makes a strong probability that such deed was executed, we do not think that she makes a case under the law announCED by our own Supreme

Court in the case of *Gillmore v. Fitzgerald*, 26 Ohio St., 171.
The syllabus reads:

“Where parol evidence is relied on to prove a deed alleged to have been lost, such evidence must clearly and satisfactorily show the existence and execution of the supposed deed, and so much of its contents as will enable the court to determine the character of the instrument.”

The evidence here does not come up to the requirement laid down in this rule. She and other members of her family may have seen what appeared to be a deed, with the names of these defendants upon it at the place where, if they were executing the same, they would have written their names, and yet they may not have written their names there. If they wrote their names, we don't know that their signing was witnessed by anybody, nor do we know that there was any certificate of acknowledgment. There are facts in the case which can not be explained except upon the theory that there was testimony produced upon the trial which was not true. We do not undertake to say who gave the false testimony, but only that if all the testimony introduced on the part of the plaintiff was true, the execution of this deed is not evidenced “clearly and satisfactorily,” as is required under the decision of the Supreme Court referred to.

The result is that the petition of the plaintiff is dismissed at her costs.

P. J. Bradley, for plaintiff.

W. T. Clark, for defendant.

1904.]

Summit County.

CARELESS FEEDING OF A RUBBER MILL.

[Circuit Court of Summit County.]

THE DIAMOND RUBBER COMPANY v. ADDISON H. McCLURG.

Decided, April 19, 1904.

Negligence—As Between Master and Servant—Where the Work Was Dangerous and the Workmen Careless—Master Not Bound to Anticipate an Accident Which Occurred in an Unheard of Way.

Where a servant, engaged in a dangerous occupation, disregards his instructions, and performs his work in a manner different from that directed, and is injured in so doing, the master can not be held liable for failure to warn the workman against an injury occurring in a manner in which he had no reason to anticipate it might occur.

MCCARTY, J. (sitting in place of Winch, J.); HALE, J., and MARVIN, J., concur.

Error to the Court of Common Pleas of Summit County.

This cause comes into this court on petition in error to reverse the judgment of the common pleas court in what is called a personal injury case. The action was tried below to a jury, a verdict in favor of the plaintiff was rendered, and motion for new trial overruled and exceptions taken. Plaintiff states his cause of action in his petition as follows:

The defendant is a corporation, incorporated under the laws of Ohio. On the 7th day of February, 1901, the defendant owned and operated certain manufacturing shops for the purpose of making rubber, which shops are situated in Akron, said Summit county, and has ever since and still operates said shops. On the 7th day of February, 1901, the defendant employed plaintiff to work in said shops, and plaintiff, pursuant to said employment, to-wit, on the 7th day of February, 1901, commenced and continued to work from said day up to the 21st day of February of said year.

That on the said 7th day of February, the defendant, through one of its foremen of said shops, ordered plaintiff to work in that part of its said shops known as the mill-room, at

a machine designated as a mixing-mill, for the purpose of mixing rubber and making rubber.

That there are two large steel rollers on the mill, placed side by side, about four feet from the floor, which rollers are about five feet in length and about twelve or fifteen inches in diameter, and when said mill was in operation, said rollers revolve together at a rapid rate of speed.

In operating this mill it was necessary for workmen, and this plaintiff to stand in front of said rollers and place the rubber on said rollers so as to run it through until properly mixed into slabs, and when the edges of said slabs were uneven and ragged it was necessary, and the duty of the workmen and plaintiff, to place said slabs on said rollers so that it would double said ragged edges back and pass through so as to even up said edges, which work was very hazardous and attended with great danger to the person operating said mill, and when said slab is placed upon said rollers as aforesaid it is liable in doubling, in the ordinary operation of said machine, to catch the hands of the person operating the same and draw them in between said rollers.

That to operate said mill, or machine, so as to avoid said dangers and to protect the operator from injury, required great experience and skill as to the proper mode of operating the same as well as a knowledge of the dangers that existed, and the injuries to the operator that might, and were liable to occur, all of which was unknown to the plaintiff, but defendant had full knowledge thereof, and well knew that the plaintiff did not know, and could not learn and discover in time to protect himself from injury.

That at the time herein mentioned the plaintiff was inexperienced in any kind of shop work, and had no knowledge or experience whatever in the operation of said mill or doing the work thereon aforesaid, and had no knowledge of the hazards and dangers attending the operation of said mill, nor had he equal means with the said defendant of knowing or ascertaining said hazards and dangers; that said hazards and dangers in the operation of said machine were not obvious; that it could only be known from skill and experience in the operation there-

1904.]

Summit County.

of, and as to the proper way to operate said machine to protect one from injury that might arise from said dangers, all of which was well known to said defendant and its said foreman.

And plaintiff says that the labor performed by him as aforesaid, and as hereinafter described, was done under the immediate direction and supervision of said foreman, and it was the duty of the defendant and its said foreman, before directing the plaintiff to work upon and operate said machine, to instruct him as to the manner of performing said labor, so as to protect himself against injury and avoid the said dangers incident thereto, and to caution and warn him of the dangers to which he was subjected in the performance of said work, but negligently and in disregard of its said duty towards plaintiff, said defendant, and its said foreman, wholly failed and neglected to so instruct the plaintiff in the premises, or caution or warn him of the dangers incident thereto.

That on the 21st day of February, 1901, while working at said mill in mixing rubber, and making a rubber slab about two feet square, it became necessary by reason of the ragged edges of said rubber slab for him to place said slab on the top of said rollers as aforesaid, and for the purpose aforesaid he did place it on the top of said rollers while they were rapidly revolving, and put his left hand on said rubber, pressing it against the roller at the side next to him, to prevent it from slipping, and so that the said rollers would catch it and double it, and said rollers did catch it, and when it doubled, the end farthest from him and on the opposing roller, was thrown over onto his said hand with great force, instantly drawing it between said rollers and so mangling it that it necessarily had to be, and was, amputated at the wrist joint. That he suffered greatly in body and mind from said injury and was for a long time sick, and is forever disabled from performing manual labor, and is permanently injured, all of which suffering and injury was directly caused by the carelessness and negligence of the defendant aforesaid, and without any fault or negligence on the part of plaintiff, to his damage in the sum of twenty thousand dollars, for which sum he asks judgment against the defendant.

Defendant for its answer says that it admits that it was and is a corporation duly organized and existing under and by virtue of the laws of the state of Ohio, and at all times mentioned in said petition it was engaged in the manufacture of rubber and rubber goods in the city of Akron, said county and state. It admits that on the 21st of February, 1901, and for a time prior thereto the plaintiff was in its employ and was engaged in operating a certain machine designed for the mixing and making of rubber sheets or slabs. It admits that on the 21st day of February, 1901, the plaintiff sustained certain bodily injuries on account of which his left hand was amputated at or near the wrist, but it avers that said injuries were caused by the inadvertence, inattention, carelessness and negligence of the plaintiff himself, and not by reason of any default, carelessness or negligence on the part of the defendant company. And further answering defendant denies each and every statement, allegation and averment in said petition contained, not herein specifically admitted or denied, and having fully answered prays to be dismissed with its costs.

To that answer a reply has been interposed which denies the statements and allegations contained in the said answer, except such as are admissions of the allegations and statements contained in the plaintiff's petition filed herein. Upon these pleadings the case was tried to a jury, and, as I have said, a verdict was rendered in favor of the plaintiff. The facts in the case are substantially as follows:

There were in this machine two large steel rollers placed side by side; they are about five feet in length and twelve to fifteen inches in diameter, and when in operation said rollers revolve together; that is, toward each other, at ten to fifteen revolutions per minute. In operating this mill it was necessary for the plaintiff to stand in front of the rollers and place the rubber on said rollers so as to run it through until properly mixed and pressed. On the 21st day of February, 1901, the injury of which complaint is made occurred, causing the loss of the plaintiff's left hand. It is claimed that the plaintiff was inexperienced in such work as this, and that the foreman neglected to instruct him in the proper way to perform this work so as to

1904.]

Summit County.

avoid the dangers incident thereto. The contention of the plaintiff in error is that the dangers were obvious, and that the plaintiff below had been fully instructed as to how to do his work safely, and that if he had followed these instructions he would not have been injured. He was instructed as shown by the record as follows:

“Q. What was this other man doing you speak of? A. He was a mill man working on the mill.

“Q. Working on the mill? A. Yes, sir.

“Q. What did he say to you in the way of operating the mill? A. He showed me; he done most of the work.

“Q. Was anything further than that said to you before you cut the rubber off when it would stick and to throw the compound in and pour oil in.

“Q. Was anything further than that said to you before you commenced the handling of the mill yourself? A. I was told not to put my hand up where the rolls begin to go downward; keep my hands down where they were coming up.

“Q. Who told you that? A. This man that I worked with and also the boss.

“Q. Who was the boss? A. Noonan.

“Q. State what Noonan said to you on that subject about the operating of the mill? A. Well, he said it was a dangerous machine and to be careful.

“Q. What further did he say? A. And not let my hands get so they would go down over; keep them at a certain point on the mill.

“Q. Was there any other foreman there while you were at work? A. Foreman?

“Q. Of those mills, that were there specially? A. A man by the name of Oberdoerster that I worked under when I commenced at night work.

“Q. What talk did you have with him on the subject of operating the mill? A. Well, he told me about the same as Mr. Noonan.

“Q. Go on and tell what was said. A. He told me to feed the rubber in certain batches, not put my hands over where the roller turned in; and when I was cutting off, if the rubber was going to catch me, to let the knife go in if it was necessary and keep my hands off of the top of the rollers in working.”

And on cross-examination he said in answer to the questions:

"Q. And all three of these men, Mr. Noonan, Mr. Oberdoerster and Mr. Hazard, told you where to put your hands and where not to put them? A. Yes, sir.

"Q. And they all told you not to put your hands above the top of the rollers? A. Yes, sir.

"Q. Calling your attention, Mr. McClurg, to your statement that Mr. Hazard, or the man with whom you worked when you first began there, that he instructed you or told you not to put your hands on top of the rolls, did he give you any reason why you should not put your hands on top of the rolls? A. Why, he said the rolls were turning inward that way that they were liable to catch my hands.

"Q. Danger of catching your hands? A. Yes, sir.

"Q. Now at the time you was injured you may state to the jury what you were doing at that time, at the time you were injured. A. Well, I was just finishing up ready to quit; it was just before the whistle blowed a little while, and I had my last batch on finishing up; it was ragged and I wanted to make it even and nice; I picked it up and throwed it in the mill, and it slid and didn't go in and went clear over the other side; I put my left hand in, and it bounded, and when it bounded it struck my wrist and arm and dragged it in before I could put it back."

That is a direct violation of his instructions. If he had followed his instructions and kept his hands above the rollers he would not have been injured. He could as easily have kept his hand out, kept it above the rollers as to have kept it from going further down. Such an injury never happened before. The company was not bound to anticipate or guard against it. It is not negligence on the part of the master to fail to instruct an employe to avoid an injury which the master had no right to anticipate would happen. It is only as to injuries that are likely to occur, not those that never did occur, that the master never heard of, that he is bound to anticipate and bound to guard his employes against. The plaintiff below clearly brought this injury on himself. The danger was obvious. He needed no instructions to keep his hands from between those rollers, and if he did, he was fully warned of all the dangers, fully instructed as to how to operate the mill and avoid being caught. He disregarded his instructions, and on no principle of law or

1904.]

Richland County.

right can he recover. The judgment of the court below will be reversed with costs, and exceptions noted.

E. K. Wilcox, for plaintiff in error.

Geo. M. Anderson, for defendant in error.

CLERKS OF SCHOOL BOARDS UNDER THE NEW SCHOOL CODE.

[Circuit Court of Richland County.]

STATE, EX REL MOWERY, v. HARRY E. CAVE.

Decided, June, 1904.

Office and Officers—Power of the Legislature and Rights of the Office-holder—Said Rights Accrue by Virtue of Election and Not of Qualification—Clerk of Board of Education—Who Had Been Elected But Had Not Qualified—When the New School Code Went into Effect.

1. While in Ohio there is no tenure of office, the office-holder possesses a legal title to the emoluments of the office so long as the office exists; and this is equally true as to one who has been duly elected, but has not yet qualified and entered upon the duties of the office.
2. Notwithstanding the statute does not say just when officers of the board of education shall enter upon their duties, it is clearly the intention that they shall assume office at once, or as soon as they give bond and qualify. A delay in giving bond amounts merely to a waiver of the rights of the one so elected during the period of the delay, and does not operate as an extension of his term for a corresponding period.
3. Where at the time the present school code went into effect, an election of clerk of the school board had been held, but the one so elected had not yet qualified, he is entitled to the office under the new code, notwithstanding the provision of Section 3 of said act.

DONAHUE, J.; VOORHEES, J., and McCARTY, J., concur.

Mandamus.

This action is brought by the relator, W. Clyde Mowery, who claims to be entitled to the office of clerk of the board of edu-

cation of the city of Mansfield. There is practically no dispute as to the facts, and the pleadings make an issue of law only.

It appears from the pleadings that Harry E. Cave on the third Monday of April, 1902, was chosen by the board of education of the city of Mansfield as clerk of that body; that he gave bond and qualified as such on the sixth day of May next following, and on the third Monday of April, 1903, he was again chosen as such clerk, and on the fifth day of May next following gave bond and qualified according to law. On the third Monday of April, 1904, which was the eighteenth day of said month, the relator, W. Clyde Mowery, was chosen by said board of education as its clerk, and on the third day of May next following he gave bond and qualified as such.

The petition avers that the respondent, Harry E. Cave, usurps said office of clerk of the board of education of the city of Mansfield and deprives relator therefrom, and prays that the said respondent may be ousted from said office and that relator be given possession thereof.

It further appears that on April 25, 1904, at 4:30 P. M., the present school code, known as the Harrison school code, was signed by the governor of the state of Ohio. The respondent contends that by Section 3 of that act it is provided that all existing officers of boards of education and school councils shall hold their respective offices until boards of education are elected and organized under the provision of that act, and that at the time said act went into effect he was in fact and in law the clerk of the board of education of the city of Mansfield, and that this act extends his term until the election of new officers, under the provision of the new code.

He further claims that his term of office as such clerk did not expire for one year from the time he filed his bond and qualified, May 5, 1903, and that therefore the relator had no immediate right to the office at the time he was chosen by the board of education as such clerk; that there was then no vacancy and that relator's term would therefore not commence until May 5, next following.

In this contention, however, we think counsel for respondent are mistaken. Section 3980, Revised Statutes, requires the board

1904.]

Richland County.

of education to organize on the third Monday of April of each year, by choosing one of its members president, and one of its members clerk, who may or may not be a member of the board. The statute does not say just when these officers shall enter upon their duties, but clearly it means immediately, or as soon as they give bond and qualify, and the neglect to qualify for ten, fifteen or twenty days thereafter, even though it had been the custom for many years, would not give the incumbent the right to hold beyond the third Monday of April, if his successor should elect to qualify as soon as chosen.

Section 3979, Revised Statutes, provides that each person elected or appointed, either as a member of the board of education, or to any other office under the title in which that section is found, shall take an oath of office.

Section 4050, Revised Statutes, provides that the clerk of the board of education shall furnish bond. So that to qualify as such an officer, it is necessary for the person chosen as such clerk to give bond and take the oath of office.

Section 8, Revised Statutes, provides that—

“Any person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless it is otherwise provided in the Constitution or laws.”

There is no prohibition in the Constitution of the state of Ohio preventing the clerk of the board of education from holding his office until his successor is elected and qualified, nor is there any statutory provision that would prevent him from so doing. There does not appear to be any term of office fixed in express words; but the statute expressly provides that on the third Monday of each April the board shall organize, by selecting a president and clerk. It is therefore evident that the clerk chosen at such meeting holds until the next organization of the board, as the term of his office, and until his successor is chosen and qualified.

In the case of *State v. Coon*, 4 C. C.—N. S., 560, it was held that the clerk of the board of education continued in office until his successor is chosen and qualified. On page 563 the court say:

“Upon the whole we therefore conclude that the relator is a public officer and was occupying the office of clerk of the board of education at the time the new school code took effect.”

In that case the board of education of Cleveland did not organize on the third Monday of April, but on the night of April 25, at 7:30 o'clock, and after the signing of the law by the governor of Ohio, which extended the time of office of the then present incumbents. So that unless the former clerk held until his successor was chosen and qualified, his term of office would have expired on the third Monday of April, and he would not have been in office on April 25, and the court would then not have declared him entitled to the office under the provision of the new law, unless it in fact found that his term of office did continue until his successor was chosen and qualified. In the case at bar at the time this new law went into effect the relator had been chosen, but had not qualified, and the respondent was in office claiming and having the right to hold the same until his successor should qualify.

The effect of qualifying later is a more serious question. Does the act of qualifying relate back to the time of his appointment, at which time his right to the office began, or simply from the time he qualified?

In *State v. Pollner*, 18 C. C., 304, it is held:

“Where the statute does not fix any time when the mayor of the city of Cleveland shall take his seat, but prescribes that he shall take an official oath, that he shall file a good and sufficient bond, which shall be approved by the city council, the term of such mayor elect commences immediately upon his election, and if he sees fit he may immediately enter upon the duties of such office, by declaring himself to be mayor; the requiring of the oath, bond or any other thing that the statute may require, is merely directory language and is not mandatory.”

In the same case on page 145, Judge Caldwell, in the opinion says:

“And, secondly, that the requiring of the oath, that the requiring of the bond or any other thing that the statute may require although the statute may be explicit, is merely directory

1904.]

Richland County.

language and is not mandatory, and I believe the courts in this country now quite unanimously, and, I do not know but entirely, say so at this time, that language of that kind is merely directory and is not mandatory language."

We, however, are not able to find the authorities so unanimous as suggested by Judge Caldwell.

In the case of *State v. County Comrs.*, 61 Ohio St., 506, it is held that where the sheriff elect failed to give bond before the first Monday of January, next after his election, there occurs on that day a vacancy. But it further appears in that case that while Section 1203, Revised Statutes, provides and directs the giving of the bond, Section 1205, Revised Statutes, provides that a failure to give the bond defeats the claimant's right to the office, and the commissioners shall declare a vacancy.

The provision of Section 1205, Revised Statutes, of course, distinguishes that case from the case at bar, and also from *State v. Pollner, supra*, but Section 19, Revised Statutes, seems to us to be as imperative as Section 1205, Revised Statutes, so that the only substantial difference between the cases is, that in the case of the sheriff the time in which bond shall be given is absolutely stated in the statute, but there is no such limit of time in which the clerk of the board of education must give bond and qualify. So that it would naturally be held to be within a reasonable time, and the board of education is undoubtedly clothed with discretion to determine what is a reasonable time, and it would only be for an abuse of this discretion that a court would interfere with its finding in that behalf. In this case the clerk elect qualified within the usual time customary in that city, and the board of education accepted his bond at the time it was presented. So that we are of the opinion that the delay in giving bond did not amount to a refusal to accept the office under the provision of Section 19, Revised Statutes, and therefore he had not forfeited his right to the same, and the only question remaining in this case is, can the Legislature of Ohio, by an act passed after his selection, deprive him of the office to which he was chosen, without abolishing the office itself?

On April 18 relator was chosen as clerk of the board of education of the city of Mansfield, and if he had qualified at once or before 4:30 P. M. of April 25, he unquestionably would be entitled to hold the office. It must also be admitted that he was entitled to qualify by giving bond and taking the oath of office at any time up until the time of the signing of the new law by the governor of the state. He was at least an officer elect with the right to the office at the time this act of the General Assembly became a law by the signature of the governor. Respondent claims that Section 3 of this act deprived relator of this right without abolishing the office. It is true that in Ohio there is no tenure of office strictly speaking; that is to say, there is no right to continue in office beyond that time which the Legislature declares there is no further need of the office. But while there is no absolute right to the office, there is a legal title to the emoluments of the office so long as that office exists, and after an individual has been properly selected, either by the vote of the people or any authority authorized to select him, even the Legislature of the state can not say that that particular individual shall not have and hold his office, but instead thereof some other person shall. This would certainly be true if the officer elected had in fact entered upon the duties of his office. Is it not equally true, if at the time of the passage of the law, he is entitled to the office? We think it is.

We have no quarrel with the doctrine that the Legislature may abolish the office, and the office once abolished the person entitled thereto, if it had continued to exist, can not complain, nor can he claim the emoluments thereof, but so long as the office continues the incumbent or the person entitled thereto can not be deprived of it by an act of the Legislature. This relator had been selected as clerk of the board of education by the board itself, and this board was clothed with ample authority to make such selection. From that time on, unless he refused to accept the appointment or neglected and refused to qualify, the office was his as matter of right. He had a legal title thereto, so far as an individual can have the legal title to an office in Ohio, and he did qualify to the satisfaction of the board selecting

him, but, in the meantime, the Legislature proposes to divest him of that right by saying that the incumbent then in office shall continue until a later time, but does not abolish the office now, but provides that it shall be abolished later. We think the Legislature can not do this. Where his term of office commenced immediately upon his selection, whether he qualified by giving bond and took the oath of office then or not, his right to the office and the emoluments thereof at once arose, and is good against the world so long as the office exists, unless he forfeits his right by refusing to accept, or neglect or refuse to qualify, or is properly removed therefrom in manner prescribed by law for the removal of officers from public office.

We therefore hold that this act did not affect his right to the office nor divest him thereof, and that he is entitled to hold the same until the office is abolished in pursuance of the statute.

Judgment of ouster may be entered against the respondent with costs, and the relator decreed to be the present rightful incumbent of the office. Motion for a new trial will be overruled and exception noted. Twenty days are given for the separate finding of fact and law, and statutory time for bill of exceptions.

Douglas & Mengert, for plaintiff.

Kerr & Le Dow, for defendant.

PERSONAL JUDGMENT.

[Circuit Court of Hamilton County.]

JOHN A. CALDWELL ET AL V. JOHN B. PEASLEE.

Decided, February 20, 1903.

Trial—Suit in Foreclosure—Endorsement of Summons—Personal Judgment in Excess of Amount Endorsed.

In a suit for the foreclosure of a mortgage and for personal judgment, it is not error to enter a personal judgment for an amount in excess of that endorsed on the summons.

SWING, J.; GIFFEN, J., and JELKE, J., concur.

This was an action in the court of common pleas for the foreclosure of a mortgage and for a personal judgment. The summons contained the following endorsement:

“Summons in action for money; amount claimed, \$639.84; for foreclosure of a mortgage, sale of real estate and other relief.”

The petition alleges that the defendants were the owners and holders of twelve shares of the Consolidated Building & Savings Company of Cincinnati, Ohio, and that said defendants borrowed on said twelve shares the sum of \$6,000, for which they executed a mortgage on certain real estate which is described in the petition; that the defendants agreed to pay certain weekly dues, premiums and interest; that the defendants have failed for a great number of weeks to pay either premiums, dues or interest; that the amount in arrears at the time of the filing of the petition is \$639.84, the amount endorsed on the summons, but the petition asked that the plaintiff have judgment against defendants for the amount that should be due, if any, after the sale of the premises.

Defendants filed no answer, but did file certain motions during the progress of the case, one of which was to make the petition more definite and certain. The court entered up a decree finding the amount due on the mortgage and ordering the sale of the premises, but entering no personal judgment.

1904.]

Hamilton County.

The property was sold, and after applying the proceeds of the sale to the payment of the debt, a large amount remained unsatisfied, and afterwards the court rendered a personal judgment against the defendant for this balance.

It is claimed by the plaintiffs in error that in rendering a judgment for an amount in excess of that endorsed on the summons the court erred.

In *Larimer v. Clemmer*, 31 Ohio St., 499, the first proposition of the syllabus is as follows

“In an action for the sale of mortgaged premises and for a personal judgment, pursuant to the act of 1864 (S. & S., 575), no endorsement on the summons as to the amount or nature of the claim is necessary, the case being governed in that respect by Section 57 of the civil code (Section 5030, Revised Statutes), but where an endorsement was made which truly indicated the amount for which judgment was afterward taken, and contained the further statement that the plaintiff sought ‘equity relief,’ a personal judgment and order of sale, rendered in default, will not be reversed.”

Under this decision it was not necessary that any amount should be endorsed on the summons, but if for money only, no judgment could be taken for any amount unless endorsed on the summons, where judgment was rendered by default. But the plaintiff, having done something that the statute did not require, should not be bound by what was done, unless it is clear that the defendants would be misled to their prejudice.

A reading of the petition taken in connection with the summons shows the claim of plaintiff. The amount endorsed on the summons was the amount then due, and was the only amount that the plaintiff was then entitled to have a personal judgment for, but further relief was asked for, and that was that the plaintiff might have a personal judgment for the balance, if any, that remained unpaid after the application of the proceeds of the sale of the mortgaged real estate. The plaintiff took no personal judgment for the amount due at the time of the decree and order of sale, but waited until the property was sold and balance ascertained, and then took judgment for the deficiency.

Defendants were not misled by the plaintiff having had endorsed on the summons the necessary statement about the \$639.84.

They appeared in court and filed a motion to make the petition more definite and certain; they knew the whole claim of plaintiff and they knew that the endorsement on the summons was for the amount then due at the time of the filing of the petition, and that the petition asked for a personal judgment for the full amount that might be due after exhausting the proceeds of the sale of the mortgaged premises.

Judgment affirmed.

Renner & Renner and *Johnson & Levy*, for plaintiff in error.
Gideon C. Wilson, contra.

END OF VOLUME IV.

INDEX.

Abandonment—

Of land conveyed for burial purposes; question of title. 45.

Abutting Owner—

Has an easement in the street which is a property right; injunction will lie to prevent interference with. 365.

Accord and Satisfaction—

The law of Ohio as to, does not differ from that of the other states or of the federal courts. 582.

Actions—

For recovery of land; signature to paper obtained by subterfuge; relief from a contract plaintiff did not read before signing; ancillary relief. 369.

Cause of, does not arise from injury to private property from operation of railway without negligence. 98.

To sell realty conveyed in trust by a residuary legatee for the protection of his surety may be brought in either probate or common pleas. 216.

Administrators and Executors—

May be made garnishee where it appears that upon the filing of his final account there will be funds on hand to pay the legacy or a part thereof to the defendant. 611.

Liability of co-administrators under a joint bond for a previous indebtedness of one of the administrators to the estate. 623.

Not entitled to commissions on real estate which formed part of the residuary estate and was conveyed by agreement. 237.

Trust company which has acted as, is entitled to compensation, regardless of invalidity of law under which the appointment was made. 237.

Defense of will by; should be allowed expenses for, notwithstanding the verdict was the result of a compromise. 237.

Claim becoming due at the death of the debtor; duty of the creditor in the event no administration is taken out by the next of kin. 449.

Statute of limitations runs against claim against the estate from the time administration should have been taken out. 449.

Affidavits—

Charging keeping open on Sunday; form used in this case sufficient. 14.

Charging one with unlawful sale of oleomargarine covers a sale made by an employee of the one thus accused. 193.

Filed with the clerk on motion for new trial and not presented to the court on hearing should not be embodied in bill of exceptions. 255.

In attachment; purpose of Section 5522 requiring that the nature of the claim be set forth in. 611.

Agency—

Attorney not made the agent of his client by the assignment to him of a judgment for collection, one-half of the amount received to be retained for professional services theretofore rendered. 406.

Where the agent represented both parties; subterfuge and misrepresentation; fraud on co-part-

ners; rights of innocent purchasers. 105.

Scope of authority of traveling solicitor for commission firm; guarantee by agent of net price for fruit shipped not binding on principal in the absence of a showing of custom. 264.

Understanding with, by purchaser as to time of delivery not binding upon the seller as against a written order of purchase. 17.

Aliens—

See Non-resident Aliens.

Amendment—

Where a defective averment is supplied by the evidence an amendment will be implied. 145.

Attachment of a box of exhibits to a bill of exceptions after the bill was signed is either an amendment of the bill, or is without significance. 225.

Appeal—

By a guardian *ad item*; may be taken as the representative of his ward; liable individually on the appeal bond. 55.

Does not lie to a judgment of the common pleas dismissing the application by a railway to define the manner in which another company may cross its tracks. 329.

From application to define manner of crossing railway tracks. 329.

From a justice of the peace; jurisdiction to take bond on appeal where the case was begun before one justice of the peace and tried before another. 427.

Legality of notice of appeal where signed by the attorney for the appellant. 427.

Assessment, Street—

For street improvement; constitutional limitation as to amount of, is waived, when. 31.

Valid where improvement was begun under a statute held constitutional and afterward declared unconstitutional; what must be shown to enjoin collection in excess of special benefits. 57.

Collection of, can not be enjoined because more was included in the improvement than council was authorized to include. 482.

Attachment and Garnishment.

Non-resident defendant not entitled to exemption in lieu of homestead. 447.

Purpose of Section 5522 requiring that the nature of the claim be set forth in the affidavit for attachment. 611.

Where issued upon a promissory note is not invalid in law because the date of the note is differently stated in the petition and the amended petition. 611.

Administrator may be made garnishee where it appears that upon the filing of his final account there will be funds in hand to pay the legacy or a part thereof to the defendant. 611.

Garnishee not a proper party, but sustains the relation of a witness; may interpose any defense he has against the action, and if knowledge comes to him of an assignment of the claim he may set that fact up by way of an amended answer as a complete defense. 585.

Attorney and Client—

Presumption as to authority of, to sign notice of appeal. 427.

Assignment of judgment to attorney by client for professional services. 406.

Auditor—

See County Auditor.

Beal Law—

Affidavit charging keeping open on Sunday; surplusage; duplicity; jurisdiction of mayor; prejudice; first and second offense; demand for jury. 14.

Election under; irregularity in publishing mayor's proclamation; validity of election can not be impeached collaterally in a criminal prosecution; change of venue; final jurisdiction; mayor's judgment for a misdemeanor can not be reviewed on weight of evidence. 81.

Beneficiary—

Can not be deprived of his rights under a mutual benefit association policy, because the policy holder had declared his intention of paying no further assessments. 519.

Benefits—

A finding of, by an assessing board should not be lightly disturbed. 31.

What must be shown in order to enjoin collection of assessment in excess of. 57.

Bids and Bidding—

Public officials may award contract to lowest responsible bidder; remedy of lowest bidder. 496.

Bills of Exceptions—

Unattached box of exhibits; not properly identified; subsequent attachment amounts to an amendment of the bill, and case can not be considered on weight of the evidence. 225.

Motion to strike from the files on the ground that the bill does not contain all the evidence should be overruled when weight of evidence is not involved. 237.

Mandamus to compel signing of; affidavits in support of motion for a new trial not part of, when; judicial discretion in signing amended bill. 255.

Time for taking for the review of an order made at the preliminary hearing in an appropriation proceeding runs from the date of the order. 329.

Where the bill of exceptions does not contain the facts and there is no finding of fact, the judgment can be modified on review only upon the pleadings. 632.

Journal entry necessary making bill a part of the record; Law can not be attacked by one what exceptions are saved by noting them in the journal entry. 384.

Effect of failure to attach policy of fire insurance to, or to prop-

erly identify the policy as an exhibit. 380.

Errors must appear upon the record; an order making the bill a part of the record necessary; original papers which are a part of the record; office of motion to strike bill from the files. 536.

Board of Education—

Clerk of, who had been elected but had not qualified when the new school code went into effect, holds over. 647.

Board of Elections—

Can not be compelled by mandamus to provide voting machines, when. 398.

Board of Equalization—

What the record must show as to additions made to tax returns; personal notice to the property owner required. 455.

Bond—

On appeal from a justice of the peace; jurisdiction to take where the case was begun before another justice. 431.

Liability under a joint bond by co-administrators for an indebtedness of one of them to the estate. 623.

Guardian *ad litem* liable individually on an appeal bond. 55.

Executed by a residuary legatee for payment of the debts of the estate is a lien against the legatee upon realty conveyed in trust for protection of the surety. 216.

An additional bond may be given, with the approval of council, by a depositary of public funds, when additional funds are placed on deposit. 345.

Bowling—

To deny colored man privilege of, in a public resort is in violation of the statute. 49.

Building Associations—

The exemption from the operation of usury laws, found in Section 3836, is constitutional. 337.

Premiums and fines when imposed by, are not usury, if reasonable. 103.

Burden of Proof—

In a will case is upon the contestants to show lack of testamentary capacity. 305.

Cemetery—

Question of title to land conveyed for burial purposes and subsequently converted to other uses. 45.

Charge of Court—

To speak of a particular item or part of the evidence as important is erroneous. 139.

Requests for special charges of negative propositions satisfied, when. 145.

Where a defendant charged with homicide was not given the full benefit of a reasonable doubt. 184.

Where the province of the jury was invaded by an expression of experience as to the conduct and actions of men. 184.

Misdirection to jury as to measure of damages immaterial where the jury assessed no damages. 225.

Where full and fair the judgment will not be reversed because of unnecessary statements which were not prejudicial to plaintiff in error. 284.

As to whether the testator acted of his own free will in disposing of his property. 305.

In a homicide case should leave the jury free to render such verdict and fix such degree of crime as their judgment and conscience dictate. 409.

Change of Venue—

Action of trial court on motion for, can not be reviewed on error, unless abuse of discretion is shown. 409.

In a prosecution under the Beal Law. 81.

City Solicitor—

May begin mandamus proceedings on his own motion to compel

a municipal board or officer to perform any duty expressly enjoined by law or ordinance. 344.

Civil Rights—

Colored man denied privilege of bowling in pleasure resort; held to have been in violation of statute. 49.

Classification—

Steam and electric railways are not of the same class under the statutes of Ohio. 329.

Collateral Attack—

Validity of election under Beal to be liquidated damages and not prosecuted thereunder. 81.

Collateral Inheritance Tax—

Consideration for promise to pay promissory note; detriment to promisee may constitute. 158.

Confession of Crime—

Extra judicial confession must be corroborated by proof *aliunde corpus delicti*; admission of confession of other crimes not cured, when. 184.

Consideration—

Not lacking where a street railway company makes a deposit as a condition of bidding for a franchise and after being awarded the franchise fails to build the road. 242.

Where a valuable consideration is recited in the deed, the line of descent can not be changed by showing by parol that the property was in fact a gift. 502.

Constitutional Law—

Exemption of building associations from operation of the usury laws constitutional. 337.

Section 135 of the Municipal Code of 1902 giving council authority to provide for the deposit of public funds is constitutional. 344.

The act of April, 1904, for the relief of county treasurers and county commissioners, is not a legislative interference with the judgment of a court. 433.

Brannock Law not unconstitutional because of denial of right of franchise to any. 494.

Section 3365-20, relating to agreements to waive damages for injuries on railroads is not against public policy. 479.

A municipal ordinance imposing a license fee upon non-residents for the privilege of canvassing for copying and enlarging portraits, is in conflict with the U. S. Constitution. 604.

Validity of a street assessment not affected where improvement was begun under a statute which had been held constitutional but was afterward declared unconstitutional. 57.

Section 3836-3, relating to building associations, not unconstitutional. 103.

Requirements of Section 3365-11 as to appointment of conductors, engineers and flagmen, unconstitutional. 126.

Contracts—

When a court will grant relief from a contract which plaintiff signed without reading. 369.

Mutuality of, lacking where the contract is for employment for no stated time, in no stipulated capacity and at no designated wage. 479.

For public work; remedy of the lowest bidder, where in the discretion of public officials the contract is awarded under Section 794 to the lowest responsible bidder; lowest bidder not entitled to damages, but may enjoin the carrying forward of the work. 496.

For purchase and sale embodied in correspondence can not be modified by parol evidence. 17.

A policy of insurance issued by a foreign corporation becomes an Ohio contract, when. 94.

Between a municipality and an interurban railway is valid, when. 242.

Of sale; deliveries by installments; failure to pay within stipulated time. 225.

Conveyance—

By church trustees of land

deeded to them for burial purposes. 45.

Corporations—

Management of, can not be interfered with by a court of equity except for fraud or collusion, or action in excess of corporate power. 11.

Is included in the word "person" as used in the civil rights statute. 49.

While equity will not decree a forfeiture, it will compel performance of conditions under which a corporation exercises its franchise. 191.

Special privileges granted to classes of corporations not unconstitutional because special. 337.

Costs—

Persons convicted of misdemeanors only can be imprisoned until fine and costs are paid. 101.

County Auditor—

Compensation to, for collecting omitted taxes where assisted by tax inquisitor; additional clerk hire on account of decennial reappraisal; indexing records of county commissioners. 465.

Justified in incurring legal expenses in resisting payment of an excessive bill for advertising. 565.

Counter-Claim—

Assertion of a groundless counter-claim, even if done in good faith, does not excuse a defendant from the performance of an obligation either admitted or proved on trial. 225.

Courts—

Do not sit as courts of appeal in hearing suits to enjoin collection of street assessments in excess of benefits. 57.

Mayor can not grant change of venue in misdemeanor cases; final jurisdiction. 81.

Not a legislative interference with, where the Legislature authorizes the payment of a moral claim, payment of which had been

enjoined on the ground that the claim was not legal. 433.

Will presume that public officials will construe the law correctly. 494.

Circuit court is without jurisdiction to hear a petition in error filed by the state in a criminal case, to reverse a judgment of the common pleas discharging the accused. 541.

Circuit court has jurisdiction to vacate or modify a judgment of the common pleas only for errors appearing upon the record. 536.

Courts, United States—

Jurisdiction of, does not obtain as against a state court in an action for the cancellation of certain writings, when; federal questions and separable controversies. 369.

Criminal Law—

Statutory provisions in cases of felony and misdemeanor; imprisonment till fine and costs are paid; conviction for abandonment of child. 101.

An examination before a grand jury is not a trial, and a plea in abatement, because of such examination, will not lie, when. 409.

Extra judicial confessions must be corroborated by proof *altunde corpus delicti*; admission of confession of other crimes not cured, when; province of jury invaded by court. 184.

Plea in abatement can not be based on compulsion of the accused to attend before the grand jury and dress as the person who committed the crime was dressed, and give testimony without advice of counsel, etc., when. 409.

Prosecutions for selling oleomargarine as butter; affidavit; trial; evidence; instructions to clerks not to sell oleomargarine except under its true name properly excluded. 193.

Irregularities in impanneling grand and petit juries; indictment for murder in an attempt to rob; premeditation not an essential element; plea in abate-

ment; waiver of constitutional privileges; change of venue; examination of jurors; degree of crime fixed by jury. 409.

Prosecution under the Beal Law; president *pro tem* of the city council, acting as mayor, without jurisdiction to try. 541.

Error can not be prosecuted from the common pleas to the circuit court for the reversal of judgment discharging the accused. 541.

Dairymen—

Not exempt from the statute prescribing how skimmed milk shall be sold. 73.

Damages—

Liability of a contractor for injury to a steam heating system in a building which he was reftitting. 445.

Reasonable damages may be recovered by the grantees for interference by grantor with a water pipe where the deed covers the right to use the pipe, although a part of it is on a lot still owned by the grantor. 434.

Lowest bidder not entitled to, when contract is awarded to lowest responsible bidder under Section 794. 496.

To property lying below grade of street from surface water. 19.

Consequential damages to private property from operation of railway. 98.

Measure of, and misdirection of jury as to, where the jury assessed no damages. 225.

For wrongful death should be based upon reasonable expectancy. 284.

Jury may consider loss of opportunity to inherit property. 284.

A certified check deposited as a condition of bidding for a street railway franchise held, upon failure to build the road,

Appropriation by an interurban a penalty. 242.

Not excessive where \$5,000 is awarded to a young mechanic for loss of an eye. 145.

Dealers—

Meaning of, as used in the statute relating to sale of skimmed milk. 73.

Deed—

To church trustees of land for burial purposes for a valuable consideration is a conveyance absolute; subsequent diversion of the property to other uses. 45.

To premises granting all the appurtenances carries the right to use water pipe leading to the house sold, notwithstanding a portion of it is on premises not conveyed by the deed. 434.

Where the consideration in is a valuable one, title comes by purchase and not by gift. 502.

Evidence necessary to establish execution of lost deed. 635.

Delivery—

Denial of, where suit is brought on a note, does not make reply necessary. 158.

Depository—

May give an additional bond when additional public funds come into his hands. 344.

Of public funds; Section 135 of the Municipal Code, giving council authority to provide therefor at competitive bidding, is constitutional. 344.

Descent—

Line of, can not be changed by showing by parol that the consideration recited in the deed by which the property was acquired was in fact a gift. 502.

The presumption as to brothers and sisters is that they are brothers and sisters of the full blood and that they are legitimate. 502.

Statute of descent and distribution not applicable to a policy of life insurance disposed of by will, when. 577.

Discretion—

Of council in the matter of a street improvement. 482.

Of public officials in awarding contracts. 496.

Divorce—

Public policy as to; decree can not be reopened, when; provisions of Section 5355 not applicable; plaintiff a non-resident and defendant served by publication; motion to reopen for fraud. 321.

Decree for, is operative from the date of its rendition; journal entry not necessary to give validity to. 298.

Court not authorized to reopen a divorce case on motion filed two days after the decree was granted, where one of the parties has married in the meantime without knowledge of the motion. 298.

Suit for, is terminated by order that the petition be dismissed, notwithstanding no reference is made to cross-petition for alimony. 298.

Drover—

Is a passenger when riding on a freight train free. 505.

Easement—

Of abutting owner in street a property right; impairment of, by the laying of a railroad track may be enjoined. 365.

Election Laws—

Are to be construed liberally. 81.

Elections—

Conditions precedent and jurisdictional facts upon which order for a Beal Law election must be based. 81.

A law extending the principle of local option in the control of the liquor traffic is not rendered unconstitutional because of the possibility that certain persons may be disfranchised at elections held thereunder. 494.

Election of Widow—

A widow by electing to take under her husband's will, devising a tract of land, does not waive her right to the fee of an undivided interest owned by her in the same land. 273.

Electric Wires—

Liability where a pedestrian was injured by contact with a telephone wire which fell across a trolley wire and onto the street. 386.

Eminent Domain—

Acquisition of property by a railway company is not a bar to the appropriation by another company of a right of way over it. 329.

As to lost deed; evidence necessary—railway of right of way over the tracks and property of a steam railway. 329.

Equity—

Will not refuse aid to innocent purchasers because of a fraud committed upon them by a co-purchaser. 105.

Error—

In the absence of a bill of exceptions or finding of facts, the court below will be presumed on review to have acted entirely within the law. 384.

Overruling of challenge for cause on examination of petit jury in capital case not error, when. 409.

Must appear upon the record in order to give the circuit court jurisdiction. 536.

Can not be prosecuted from the common pleas to the circuit court to reverse a judgment in a criminal case discharging the accused. 541.

Reviewing court without jurisdiction to render a different judgment than the one rendered below, except as based upon the pleadings or the facts. 632.

Does not lie to the determination of a case by the court where each party has moved for an instructed verdict in his favor. 68.

The giving of a correct and an incorrect charge, where it can not be determined which the jury followed, is prejudicial error. 139.

Prejudicial and immaterial in a will case. 139.

Review of proceeding for con-

struction of will; necessary parties. 237.

Review on weight of evidence not permissible where there is an unattached and unidentified box of exhibits to which the record appears to refer. 225.

Execution—

Priority of senior judgment lost by failure to issue execution within one year. 574.

Executors—

See Administrators.

Exemption—

Of widow not the owner of a homestead; not entitled to exemption, unless. 344.

Non-resident not entitled to exemption in lieu of homestead. 447.

Laws relating thereto must be liberally construed; exemption to widow. 556.

Expert Testimony—

Properly heard as to the character of an insulator in use on trolley wires. 386.

Of no value in a will case unless the facts assumed in the hypothetical question are true. 305.

Eviction—

Notice to a tenant to vacate on pain of eviction is not an eviction when the lease has not expired. 531.

Evidence—

By parol can not be introduced to modify written order of purchase and sale. 17.

Rule of the police department as to observing defects in sidewalks is competent in proving knowledge of city of a defect. 37.

Competent and incompetent in a suit to set aside a will. 139.

In a trial for selling oleomargarine as butter, testimony as to instructions given by the accused to his clerks may be properly excluded. 193.

Of payment of a debt sued on not permissible, when. 268.

In parol inadmissible to vary a contract of fire insurance. 380.

Hearsay evidence competent for the purpose of. 386.

Evidence of leaks at other insulators not competent in a controversy as to liability for the escape of a current from a particular insulator. 386.

The line of descent of property can not be changed by showing by parol that the consideration recited in the deed was in fact a gift. 502.

Plaintiff in an action for false arrest is put upon proof as to the entry of a *nolle prosequi*, where denied by defendant for want of knowledge. 516.

As to good faith of a trustee in mortgaging property which he had power to sell, admissible. 616.

Agent or employe of adverse party can not be called for purpose of cross-examination, when. 625.

Necessary proof to establish liability of railway company where a freight brakeman expelled a trespasser from a moving train to his injury. 625.

sary to establish execution of a lost instrument. 635.

Fees—

Statutory fees may be paid to a trust company which has acted as administrator without objection under an invalid law. 237.

Felony—

Statutory provision for imprisonment until fine and costs are paid not applicable in cases of felony. 101.

Fellow Servant—

A locomotive engineer and a helper in the yards are not fellow-servants. 284.

Fines—

Persons convicted of misdemeanors only can be imprisoned until fines and costs are paid. 101.

Fixtures—

Uncertainty as to whether articles are, is to be resolved in favor of the landlord, when. 160.

Forcible Entry and Detainer.

Where the justice of the peace has been reversed in a proceeding in; lease too indefinite to constitute a contract. 564.

Franchise—

Corporation may be compelled by injunction to perform the conditions under which it exercises its franchise. 191.

For a street railway; consideration for a deposit made as a condition for bidding; deposit collectible by municipality. 242.

Can not be accepted as soon as granted and the company afterward relieve itself from the obligation on the ground that at the time of its acceptance the franchise had not been published. 242.

Upon going into effect after legal publication relates back to the time of its acceptance. 242.

Fraud—

In the sale of a gas and oil lease; contract of sale rescinded. 105.

Not ground for reopening a decree for divorce, when. 321.

Nature of, that will warrant the cancellation of a contract which the plaintiff signed without reading. 369.

Garnishee—

Payment by, under order of court but knowingly to a creditor of one who had assigned the claim. 585.

Guaranty—

By a solicitor for a commission firm as to net price for fruit shipped not binding on principal, unless. 264.

Guardian—

Appeal by a guardian *ad litem*; liable individually on the appeal bond. 55.

Guardian of the estate of minors stands in the same relation to them as the guardian of their persons with respect to provision for their care and education. 616.

Homestead—

Right of a widow thereto the same as of other unmarried females. 344.

Exemption in lieu of, is limited to residents of this state. 447.

Allowance of \$500 to widow in addition to her dower interest; her right thereto not lost by reason of abandonment of any claim to hold the premises as a homestead or by reason of her joining in the execution of a mortgage. 556.

Homicide—

Premeditation not an essential element in an indictment for murder in the first degree, when. 409.

Husband and Wife—

Bequest to wife of something over one-third of testator's estate not so in excess of her rights as to raise a presumption of undue influence. 545.

Joint will not created by, where separate wills and separate codicils are executed at different times making a practically identical disposition of separate property. 161.

Hypothetical Question—

Facts assumed in question are competent where there is testimony tending to establish them. 305.

Materiality of facts in, not for the jury. 305.

Value of opinion of expert where the facts assumed in the question are not all established. 305.

Indictment—

Not necessary that manner and means of death be set out, but where set out must be proved as alleged. 184.

For murder in an attempt to rob; premeditation not an essential element. 409.

Injunction—

Will lie to prevent interference with rights of an abutting owner in the street. 365.

Against an expenditure by a secret society will not lie, unless. 11.

Will lie to prevent collection of assessment for street improvement in excess of special benefits, when. 31.

A court of chancery may by mandatory injunction require a turnpike to be put in repair as required by its franchise. 191.

Insurance, Fire—

Consent of agent to sale of property insured includes consent to all the conditions of the sale, including the mortgaging of for part of the purchase price. 73.

Condition in policy against incumbrances can not be defeated by parol evidence; effect of failure to attach policy to bill of exceptions or to properly identify it. 380.

Bequest of interest in policy of, without abatement for premiums paid. 571.

Insurance, Life—

Occupation of "railroad freight brakeman" excluded; character of the excluded occupation to be determined by the hazard. 68.

Policy issued by a foreign corporation becomes an Ohio contract when the application is made, the policy delivered and the premiums paid in Ohio. 94.

Where a policy was issued prior to 1879, Section 3629 does not apply. 94.

Interstate Commerce—

What it is; goods not subject to state taxation, when; license tax a tax on goods; and is a direct burden on interstate commerce, when; ordinance imposing license in conflict with U. S. Constitution. 604.

Joinder—

Where a telephone wire fell across a trolley wire and onto the street, the two companies were properly joined in a suit by one shocked by contact therewith. 386.

Judgment—

Reopening of, under Section 5355. 321.

Assignment of, by client to attorney in payment for professional services. 406.

In a suit for foreclosure of a mortgage and personal judgment, it is not error to enter personal judgment for an amount in excess of that endorsed on the summons. 654.

The modifying of or reversal of in proceedings in error; can only be done on the pleadings or the facts. 632.

Judgment Liens—

Priority as between; priority lost by failure to issue execution within one year. 574.

Judicial Discretion—

In the signing of a bill of exceptions. 255.

Jurisdiction—

Of mayor under the Beal Law. 81.

Of Ohio courts to enforce statute of another state for negligently causing death of a citizen of that state. 172.

In an action to sell realty conveyed in trust by a residuary legatee for the protection of his surety. 216.

It is incompetent in such a suit for the common pleas to attempt to fix costs and expenses of administration. 216.

The common pleas court is without, under Section 3333-1 to define the manner in which an interurban may cross a steam railway. 329.

A question as to, must be determined though not insisted on; a prayer for cancellation of certain writings does not raise a question of, as against the re-

ceiver of a railroad appointed by a Federal court, when; Federal questions and separable controversies. 369.

Of state courts over watercraft; Ohio statute provides a lien for supplies. 401.

Jurisdiction of a justice of the peace to take an appeal bond in a case begun before another justice. 431.

Circuit court is without, to hear a petition in error filed by the state in a criminal case to reverse the judgment of the common pleas discharging the accused. 541.

Of president *pro tem* of council acting as mayor; trial before under the Beal Law. 541.

Of the circuit court to vacate or modify a judgment of the common pleas. 536.

Of probate court not interfered with by proceedings making an administrator garnishee. 611.

On error to reverse or modify a judgment. 632.

Juror—

Juror not guilty of misconduct in answering incorrectly in examination on his *voir dire*, when. 139.

Jury—

Demand for in trial under the Beal Law. 1.

Province of, invaded by court in making a statement of experience as to the conduct and actions of men. 184.

Questions for, in a will case. 305.

Irregularities in impanneling of, not ground for quashing indictment or for a plea in abatement, when. 409.

Panel for a petit jury in a capital case when containing less than thirty-six names may be filled by special venire. 409.

An examination before a grand jury is not a trial, and a plea in abatement, because of such examination, will not lie, when. 409.

Examination of petit jury on their *voir dire*; statement of

juror that he has formed an opinion or prejudice against the defendant, but thinks he could render an impartial verdict; overruling of challenge for cause not error. 409.

Justice of the Peace—

Jurisdiction of, to take an appeal bond in a case begun before another justice. 431.

Proceedings in forcible entry and detainer where the justice has been reversed. 564.

Knowledge—

Of a teamster not the knowledge of his employer, when. 25.

Landlord and Tenant—

Uncertainty as to whether articles are fixtures to be resolved in favor of the landlord, when. 160.

Notice to vacate on pain of eviction is not an eviction where the lease has not expired. 531.

Law and Fact—

There is a case for the jury where there is conflict in the evidence with testimony admitted without objection which supplies an omitted material averment. 145.

Lease—

Too indefinite in its terms to constitute a contract. 564.

Legislature—

May authorize the payment of a moral claim, notwithstanding the claim has been held to be not legal and payment enjoined on that ground. 433.

Power of, with reference to public offices and office holders. 647.

License—

A license tax is a tax on goods and a direct burden on interstate commerce, when. 604.

Lien—

For supplies furnished to water-craft under the Ohio statute. 401.

Of the state, for taxes on land not affected by pending suit in foreclosure. 129.

Bond executed by a residuary legatee is a lien as against the legatee, when. 216.

Limitation of Actions—

When the statute begins to run as to a claim which became due at the death of the debtor. 449.

Liquor Laws—

The Brannock Law is not unconstitutional because of a possibility that certain persons may be disfranchised at elections thereunder. 494.

President *pro tem* of council acting as mayor without jurisdiction to try one accused under the Beal Law. 541.

Lis Pendens—

Doctrine of, not applicable against proceedings under a sale for taxes. 129.

Malicious Prosecution—

Termination of prosecution necessary to maintain action therefor; plaintiff put upon proof of entry of *nolle prosequi*, when. 516.

Mandamus—

To compel signing of bill of exceptions; does not lie, when. 255.

Action in, may be begun by the city solicitor on his own motion to compel a municipal officer or board to perform any duty expressly enjoined by law or ordinance. 344.

Will not lie to compel the providing of voting machines by a board of elections, when; does not lie in anticipation of omission of official duty. 398.

Will not lie to compel award of a contract to the lowest bidder, when. 496.

To compel allowance of legal expenses properly incurred by county auditor. 565.

Master and Servant—

Liability of master for wrong-

ful act of servant; act must have been done under authority, express or implied. 625.

Master not bound to anticipate an accident which occurred in an unheard of way. 641.

Liability of master to servant who is at work in a place which without notice to him is rendered unsafe. 284.

Mayor—

Jurisdiction of, under the Beal Law; prejudice. 81.

President *pro tem* of council acting as mayor without jurisdiction to try a case under the Beal Law. 541.

Milk—

Dairymen not exempt from statute prescribing that skimmed milk can be sold only from plainly marked cans. 73.

Misdemeanor—

One convicted of, may be imprisoned until fine and costs are paid. 101.

In misdemeanors all are principles and it is not necessary to allege that the act was by an employe or agent. 193.

Mortgage—

Placing of for part of purchase price, on property sold with the consent of the insurance company does not invalidate the policy. 78.

The trustee of an express trust with power to sell has power to mortgage. 616.

In a suit for foreclosure of, personal judgment may be entered for more than the amount endorsed upon the summons, when. 654.

Mortgage, Chattel—

Incumbrance of, renders a policy of fire insurance invalid, notwithstanding agreement with the agent to the contrary, when. 380.

Motion—

Office of, to strike bill of exceptions from the files. 536.

By each party for an instructed verdict in his favor gives the determination of the case to the court. 68.

Municipal Corporations—

Control of, over construction and operation of street railways; consideration of a deposit made as a condition for bidding for franchise. 242.

Can not impose a license fee upon a manufacturer in another state who sends an agent into the municipality to solicit orders for his goods. 604.

Mutual Benefit Societies—

Requisites of notice of assessment; rights of beneficiaries. 519.

Negligence—

Where a telephone wire fell across trolley wires and onto the highway; became heavily charged and injured a traveler. 1.

Whether telephone wires should be safeguarded is a mixed question of law and fact, to be submitted to the jury under proper instructions. 1.

Whether the proximate cause was negligence or a *vis major*. 19.

Where a heap of rubbish was undermined by a smouldering fire and a child fell into the fire. 25.

In creating a dangerous condition; party responsible not aware of the condition. 25.

Where a telephone wire fell across a trolley wire onto the street and a pedestrian was shocked by contact. 386.

Liability for in causing the death of a non-resident alien. 434.

Of a contractor in causing injury to a steam heating apparatus in a building upon which he was at work. 445.

At a railway crossing; the rule as to looking and listening; negligence of the railway company immaterial where this rule is not observed. 500.

Questions as to, between railroad company and drover who was injured while walking back along the train to reach the caboose. 505.

Liability for injury to a green brakeman from a projecting switch-staff. 593.

As between master and servant; where the work was dangerous and the workman careless; master not bound to anticipate an accident which occurred in an unheard of way. 641.

Railway company not liable for death of an engineer killed in an accident which he could have avoided by obeying orders. 120.

Pleading where negligence is involved; placing an employe at new work and giving him an inexperienced assistant. 145.

The duty to plead and the burden of proving contributory negligence as laid down in 49 O. S., 598, constitutes an exception to the general rule. 145.

Ohio courts have jurisdiction in actions to recover damages for death of one in another state, although at the time the next of kin were citizens of that state. 172.

In crossing street railway tracks; pedestrian guilty of negligence in failing to look for car. 257.

Where an employe was given a place to work which without notice to him was afterward rendered unsafe. 284.

Nolle Prosequi—

Proof of entry of, necessary in action for damages for false arrest, when. 516.

Non-resident Aliens—

An action may be maintained for negligently causing death of, in this state. 437.

Notice—

Of appeal; legality of, where signed by the attorney for the appellant. 427.

Personal notice to property owner required before board of

equalization can make addition to tax return. 455.

Of the levying of an assessment by a mutual benefit society must be in fact given to the member, where the constitution requires actual notice. 519.

To a tenant to vacate on pain of eviction does not constitute eviction, when. 531.

Failure of assignee of a chose in action to give notice of the assignment to the debtor immaterial as against an attaching creditor. 585.

Brakeman unacquainted with the road can not be charged with notice of location of a projecting switch-staff. 593.

As to a dangerous condition from a smouldering fire in a heap of rubbish; knowledge of teamster of the fire, not knowledge of his employer. 25.

To municipality of defect in sidewalk; knowledge of a policeman the knowledge of the city, when; rule of police department as to observing defects competent as evidence. 37.

To one consenting to the commission of a fraud upon his co-partners is not notice to them. 105.

Office and Officers—

Duty of an officer in incurring unusual expenses in the interest of the public. 565.

Clerk of school board is a public officer. 560.

Power of the Legislature; rights of the office holder accrue by virtue of election and not of qualification; applied to clerk of board of education. 647.

Oil and Gas—

Sale of lease by an agent who represented both parties; inspection prevented; sale rescinded. 105.

Oleomargarine—

Statute governing sale of, as butter; proprietor of store responsible for violation of by a clerk. 193.

Ordinance—

Passed at a special meeting of council valid; effect of failure to notify member of special meeting. 344.

Failure to publish for the requisite time does not invalidate the street improvement ordered therein. 482.

Imposing a license upon non-residents for the privilege of canvassing for copying and enlarging portraits is invalid. 604.

Parties—

Legatees who have been paid are not necessary parties to a controversy which relates to the residue of an estate. 237.

A garnishee not a proper party, but sustains the relation to the proceeding of a witness. 585.

Partnership—

Notice to one member of a firm who is consenting to the commission of a fraud is not notice to his co-partners. 105.

Payment—

As an affirmative defense in an action on an account; general denial. 268.

Plea in Abatement—

Can not be based on compulsion of the accused to attend before the grand jury, and give testimony without the advice of counsel, and to dress as the person who committed the crime was dressed, etc., when. 409.

Pleading—

In drawing a petition where the cause of action is based on a deed, it is better practice to make the deed an exhibit rather than a part of the petition. 434.

In an action for false arrest, where it is claimed the action terminated in a *nolle prosequi*. 516.

Affirmative allegations necessary in a petition for an injunction against. 11.

Denial of delivery of a promissory note or that there is any-

thing due thereon does not set up new affirmative matter making reply necessary. 158.

Where negligence is involved; establishing a causal connection with the injury; amendment implied where a defective averment is supplied by the evidence; when the purpose of pleading is accomplished. 145.

In an action on an account where payment is to be made an affirmative defense. 268.

Where the case was tried upon the theory that the pleadings presented an issue not therein contained. 318.

Police Regulations—

Are not to be interpreted as are revenue laws and admit of no favored classes. 73.

Policeman—

Knowledge of, as to defect in sidewalk is knowledge of the city, when. 37.

Premiums and Fines—

When imposed by building associations are not usury when reasonable. 103.

Presumption—

In the absence of a bill of exceptions or finding of fact it will be presumed that the court below acted within the law. 384.

That the attorney for appellant had authority to sign the notice of appeal. 427.

It will be presumed by courts that public officials will adopt a correct construction of the law. 494.

As to brothers and sisters is that they are of the full blood and are legitimate. 502.

Is that the offense charged is the first offense, where one is on trial under the Beal Law. 1.

Principal and Surety—

An indebtedness to an estate from one of two joint administrators will be regarded as having come into their joint possession, and as between themselves and

the surety upon their joint bond they are both principals. 623.

Priority—

Of the lien of a senior judgment is lost as against a subsequent judgment by failure to issue and levy execution within one year from rendition of senior judgment. 574.

Privilege—

Of refusal by one accused of crime to answer; failure to claim constitutional rights with respect thereto. 409.

Probate Court—

Jurisdiction of, not interfered with by making an administrator garnishee. 611.

Promissory Note—

Consideration for promise to pay; detriment to promisee may constitute consideration; delivery. 158.

Putting of, in evidence constitutes a *prima facie* case. 158.

A writing in the form set out in the petition constitutes a promissory note. 611.

An attachment issued in a suit upon, is not insufficient because the date of the note is differently stated in the petition and the amended petition. 611.

Property Rights—

Claim for negligently causing the death of a non-resident alien is in this state a property right. 437.

Public Policy—

With reference to divorce; decrees for should be treated as belonging to a peculiar class and governed by principles especially applicable thereto. 321.

It is not against, to permit railroad companies to employ persons who have been injured in the service. 479.

Publication—

Of mayor's proclamation under the Beal Law; irregularity in. 81.

Failure to publish ordinance ordering street improvement for the requisite time after ordinance became effective. 482.

Quo Warranto—

Will lie to determine the right of a clerk of a school board to hold over under the new school code. 560.

Railways—

Depreciation of property from operation of, without negligence is *damnum absque injuria*; consequential damages. 97.

Company not liable for death of an engineer killed in an accident which he could have avoided by obeying orders. 120.

The act regulating the appointment of conductors, engineers and flagmen unconstitutional. 126.

Liability of company for injury to a helper in the yards from the starting of a locomotive which stood on a grade. 284.

Acquisition of property by is not a bar against appropriation of right of way over by another company. 329.

Steam and electric are not of the same class. 329.

Laying of track in street may be enjoined by abutting owners, when. 365.

The rule as to looking and listening applies where the view is obstructed until near the track. 500.

The act construed declaring void agreements for waiver of damages by persons injured. 479.

Drover traveling free on a freight train is entitled to the protection of a passenger while walking along the tracks to reach the caboose. 505.

Company liable for injury to an inexperienced brakeman from a projecting switch-staff. 593.

Liability of company for expulsion by a freight brakeman of a trespasser from moving train; authority not implied; proof that he was a brakeman not sufficient. 625.

Liability where an accident had occurred from the escape of the electric current through a telephone wire which fell across the trolley wire and onto the street. 386.

Reasonable Time—

For application by a creditor for letters of administration depends upon the circumstances in each particular case. 449.

Receiver—

Jurisdiction in a suit to cancel certain writings where the defendant was receiver under appointment of a Federal court. 369.

Records—

What exceptions may be saved by noting them on the journal. 384.

Of action of board of equalization in making addition to tax return should contain, what. 455.

Mere filing of bill of exceptions in the circuit court does not make it a part of the record, nor can an order of the court making it a part of the record be presumed from its allowance by the trial judge. 536.

Errors must appear on, in order to give the circuit court jurisdiction. 536.

Where the record merely shows that the case was heard and was argued by counsel and judgment was rendered, there can be no modification or reversal on review. 632.

Where incomplete, necessary findings to support judgment will be presumed by a reviewing court. 19.

Res Judicata—

A final judgment of the probate court in a proceeding by an interurban railway to appropriate right of way over the tracks of a steam railway is, as to what questions. 329.

Retroactive Legislation—

Valid where a non-legal claim

with respect to a past transaction is made valid. 433.

Robbery—

Indictment for murder in an attempt to rob. 409.

Sales of Personalty—

Purchases and deliveries by installments; effect on contract of sale of failure of purchaser to pay within stipulated time. 225.

Schools—

Construction of the new school code with reference to election of clerk of board of education. 647.

Clerk of school board is a public officer within the purview of the new school code. 560.

Secret Societies—

Management of, can not be interfered with by a board of equity, except for fraud or collusion, or action in excess of corporate power. 11.

Service by Publication—

Not ground for reopening a divorce case, when. 321.

Set-off—

Admitted liability of a contractor for injury to a steam heating system in a building upon which he was at work is a valid set-off against his account for balance due. 445.

A claim for premiums paid on a life insurance policy does not constitute, when. 577.

Sewer—

A drain sewer may be properly included in a street improvement though not petitioned for. 482.

Sidewalk—

Knowledge of policeman of defect in, is the knowledge of the city, when. 37.

Specific Performance—

The receiving in silence by the defendant of an assertion by the purchaser as to him having made the purchase not a ground for

suit for specific performance. 318.

Statutes Considered and Construed—

Section 4426-1, known as the civil rights statute. 49.

Section 4364-20a; validity of election under, can not be impeached collaterally. 81.

Section 4364-20i is inclusive; rule that a defendant may raise the constitutionality of the statute under which he is prosecuted does not apply under this statute. 81.

Sections 1817 and 6529, providing for a change of venue, not applicable to the mayor's courts. 81.

Section 3365-11, relating to the appointment of conductors, engineers and flagmen affects unequally persons and property and is unconstitutional. 126.

Section 4200-17, relating to the sale of oleomargarine. 193.

Section 4200-11, relating to the sale of skimmed milk. 73.

Section 3836-3, relating to building associations not unconstitutional. 103.

Section 3629, relating to insurance. 94.

Section 6134a, giving right to enforce statutes of other states. 172.

Section 5355, relating to the re-opening of cases within five years in cases of service by publication not applicable to divorce cases. 321.

Sections 3333-1 and 5226, relating to appeal. 329.

Section 3836, relating to building associations. 337.

Section 5441, punctuation of. 344.

Section 1777, as amended. 344.

Section 135 of the Municipal Code of 1902. 344.

95 O. L., 420, providing for the purchase of voting machines. 398.

Section 5880, relating to supplies furnished to a vessel. 401.

Section 5227, relating to appeal to the circuit court. 427.

The act of April, 1904, for the

relief of county treasurers and county commissioners. 433.

Section 2807, relating to the equalization of tax returns. 455.

The Brannock Law, providing for the further control of the liquor traffic. 494.

Section 3365-20, declaring void agreements waiving damages for injuries. 479.

Section 794, relating to the award of contracts for public work. 496.

Section 1076, providing additional allowance to county auditor for clerk hire. 465.

Section 1536-854, relating to village councils. 541.

Section 6709, conferring jurisdiction on the circuit court. 536.

Section 5302, as amended, relating to bills of exceptions. 536.

Section 4366, fixing the rate of official advertising. 565.

Section 5437, relating to exemption to widow or unmarried child. 556.

The new school code; tenure of office of clerk of the school board. 560.

Section 8, relating to public officers. 560.

Purpose of Section 5522, requiring that the nature of the claim be set forth in an affidavit for attachment. 611.

Sections 5438 and 5441 relating to exemption. 447.

Sections 6134 and 6135, relating to deaths caused by negligence. 437.

Section 5243 does not apply to an agent or employee of the adverse party. 625.

The provision of Section 3 in the new school code. 647.

Section 5243, relating to the calling of witnesses of adverse party for purpose of cross-examination. 625.

Street—

Easement of abutting owner therein a property right; impairment of, by laying a railroad track may be enjoined. 365.

Improvement of, by petition in counties not containing a city of

the first class; discretion and duty of council; a drain sewer properly included in a street improvement, though not petitioned for; method of assessment; benefits. 482.

Constitutional limitation on amount of assessment for improvement of, may be waived; effect of petition for improvement; estoppel. 31.

Title to portion of which has been vacated reverts to present adjoining owners; injunction against collection of excess of assessment over special benefits; what must be shown; province of the court in reviewing assessment; validity of assessment not affected where improvement was begun under a statute held constitutional and afterward declared unconstitutional. 57.

Street Railways—

Municipal control over the construction and operation of; consideration for deposit made as a condition of bidding for franchise; failure to build the road; check deposit held to be collectible. 242.

Pedestrian guilty of negligence in attempting to cross track without looking for car. 257.

Summons—

Personal judgment can be taken for more than amount endorsed on, when. 654.

Sunday—

Keeping a place where intoxicating liquors are sold open on. 14.

Surety—

For a residuary legatee; lien of, as against the legatee upon property conveyed in trust for protection of the surety. 216.

Surface Water—

Where damages to property from, are due to a low situation, it is immaterial whether the doctrine of the civil or the common law be applied. 19.

Damages from can not be recovered where the property lies lower than the street grade. 19.

Surplusage—

In an affidavit charging keeping place where intoxicating liquors are sold open on Sunday, all reference to sale of liquor is surplusage. 1.

Phrase in lease treated as. 564.

Taxes—

See Collateral Inheritance Tax.

As against proceedings under a sale for, *lis pendens* is not applicable; paramount interest of the state. 129.

Additions to tax returns; duties of boards of equalization; what the record as to additions must show; personal notice required to owner. 455.

Compensation to county auditor for collecting omitted taxes where assisted by tax inquisitor. 465.

License tax a tax on goods; goods not subject to state taxation, when; a direct burden on interstate commerce. 604.

Telephone Wire—

Breaks and falls across trolley wires and onto the highway; becomes heavily charged, injures a traveler; as to necessity for guard wires. 1.

Title—

To portion of street vacated reverts to present owners of abutting lots. 57.

Comes by purchase and not by gift, where the consideration expressed in the deed is a valuable one. 502.

To a chose in action assigned without notice to the debtor. 585.

Treaty with Italy—

Construed as to the right of a citizen of that kingdom to enforce a claim in this country. 437.

Treasurer—

Of a municipality has no discretion as to whether he will or will not obey an ordinance pro-

viding for a depository of public funds. 344.

Trial—

Personal judgment may be entered, in suit for foreclosure of mortgage and personal judgment, for more than the amount endorsed on the summons. 654.

Putting a promissory note in evidence make a *prima facie* case. 158.

Where the trial proceeded on the theory that the pleadings presented an issue not therein contained. 318.

Trust—

Where the same trust is created by separate wills by the husband and wife devising separate property, the trust created by the husband's will is not affected by the invalidity of the wife's will. 161.

Trustee of an express trust with power to sell has power to mortgage; evidence that trustee and mortgagee acted in good faith admissible. 616.

Trust Companies—

Fees to, for acting as administrators under an invalid law. 237.

Turnpike—

Company in default for repair of, as required by its franchise; mandatory injunction to compel repair; what constitutes repair. 191.

Usury—

The exemption found in Section 3836 of building associations from the operation of usury laws is constitutional. 337.

Fines and premiums when imposed by building associations are not, when reasonable. 103.

Usage—

In the absence of a showing of, a commission firm is not bound by guaranty of its solicitor as to net price of fruit shipped. 264.

Verdict—

Motion to direct where made by

both parties gives the case to the court for determination. 68.

Of \$5,000 for loss of an eye by a young mechanic is not excessive. 145.

Voting Machines—

Mandamus will not lie to compel the purchase of, when. 398.

Waiver—

Of constitutional limitation as to amount of assessment as to street improvement. 31.

Water-craft—

State courts have jurisdiction over, where the constitutionality of a state statute is involved; lien for supplies provided by the Ohio statute; state court may direct to whom purchase money shall be paid. 401.

Water Pipe—

Use of can not be interfered with by grantor, who conveyed the premises by warranty deed with all the appurtenances thereto belonging. 434.

Widow—

Did not by electing to take under her husband's will devising a tract of land waive her right to the fee of an undivided interest owned by her in the same land. 273.

Not the owner of a homestead entitled to exemption, when. 344.

Provisions of Section 5437, relating to exemption to. 556.

Wills—

Competency of testator to make; undue influence can not be inferred, when. 545.

Bequest of interest in life insurance policy not subject to set-off on account of premiums paid, when. 577.

It is not the attempt but the effect of the attempt to unduly influence that determines; testimony in suit to set aside. 139.

The inhibition as to joint wills; separate wills of husband and wife devising separate property not joint because the dispositive

made of property is the same. 161.

Review of proceeding for construction of, does not involve weight of evidence; necessary parties thereto: defense of will by administrator; expenses therefor. 237.

Construction of will of husband devising land in which his wife owned an undivided interest. 273.

Testamentary capacity although body and mind are enfeebled; burden of proof as to; jury must find that testator did not exercise his own free will; hypothetical questions; opinion of experts of value, when; materiality of facts in hypothetical question; questions to jury need not be answered in case of a general verdict. 305.

E. H. P.
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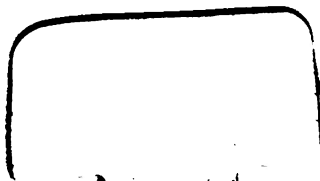
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